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In The
Supreme Court of the United States

CIGNA CORPORATION, *et al.*,

Petitioners,

v.

PAUL LEODORI,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of New Jersey

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

May a state court adopt a rule requiring an employee's "unmistakable" assent to an arbitration agreement before the agreement will be enforced, when no such requirement is generally applicable to the enforceability of other contracts under state law, or is such a requirement pre-empted by the Federal Arbitration Act as construed by decisions of this Court such as *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681 (1996)?

LIST OF PARTIES AND RULE 29.6 STATEMENT

Petitioners are CIGNA Corporation, CIGNA Insurance Company, Insurance Company of North America, Wilson Taylor, Thomas Wagner, Gerald Isom, James Engel, John Murphy, David Gold, Beverly Sherbondy, Stephanie Middleton, Anthony Smith, Alfred DeCrane, James J. Ritchie and Robert Campbell. CIGNA Corporation is a publicly traded company on the New York Stock Exchange. CIGNA Insurance Company and Insurance Company of America are indirectly wholly-owned subsidiaries of ACE Limited ("ACE"), which is a publicly traded company on the New York Stock Exchange. No publicly traded company owns ten percent or more of CIGNA Corporation or ACE Limited stock. No other publicly held corporation or publicly held entity has a direct financial interest in the outcome of this litigation.

Respondent is Paul Leodori.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully pray that a writ of *certiorari* issue to review the judgment of the New Jersey Supreme Court in this case.

DECISIONS BELOW

The opinion of the New Jersey Supreme Court is reported at 814 A.2d 1098, and is reprinted in the Appendix ("App.") hereto at 1a. The opinion of the New Jersey Appellate Division is unreported and is reprinted at App. 21a. The Orders of the trial court are reprinted at App. 38a.

JURISDICTION

The opinion of the New Jersey Supreme Court was issued on February 13, 2003. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a) (1993).

STATUTORY PROVISIONS INVOLVED

The Federal Arbitration Act, 9 U.S.C. §§ 1-16 (2000) ("FAA" or "Act"), provides in pertinent part:

> *§ 2* A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing

controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

§ 3 If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

STATEMENT OF THE CASE

The New Jersey Supreme Court held that the arbitration agreement could not be enforced because petitioners had not demonstrated "unmistakable" assent to arbitrate, despite respondent's receipt of the employee handbook containing the arbitration policy and his knowledge of the policy. The question presented by this case is whether a state court may, consistent with the Federal Arbitration Act, refuse to enforce a predispute employment arbitration agreement unless it satisfies an "unmistakable" assent requirement, when no such requirement is generally applicable to all contracts under state law. This Court has answered "no" to the question presented here in virtually every FAA preemption case it has decided, and mostly

clearly in *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681 (1996). But too many courts still cling to the judicial bias against arbitration that provoked the FAA – the New Jersey Supreme Court is not alone in its effort, reflected in this case, to place arbitration agreements on a different footing from other contracts under state law. On the other hand, many other courts adhere strictly to the mandate of the FAA and this Court's decisions to treat arbitration agreements just like any other type of contract. *Certiorari* is warranted not only to resolve the clear conflict between the decision below and the decisions of this Court, but also to resolve the continuing division in the federal circuits and state courts of last resort over the question whether arbitration agreements may be subjected to special rules and conditions before they will be enforced.

A. Statutory Background

The Federal Arbitration Act, 9 U.S.C. §§ 1-16, was enacted in 1925 to overcome longstanding judicial reluctance to enforce arbitration agreements. *See Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 270-71 (1995). In the place of judicial suspicion of and hostility to arbitration, the FAA imposed a "liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). The "preeminent concern" behind the FAA was to "enforce private [arbitration] agreements into which parties had entered." *Perry v. Thomas*, 482 U.S. 483, 490 (1987) (internal quotation omitted) (citation omitted). Because the essential purpose of the FAA is "to place arbitration agreements upon the same footing as other contracts," *Gilmer v. Interstate/Johnson Lane Corp.*, 500

U.S. 20, 33 (1991); *see also Allied-Bruce*, 513 U.S. at 271 (same, citing cases), its necessary effect is to preempt any state law that would "undercut the enforceability of arbitration agreements," *Southland Corp. v. Keating*, 465 U.S. 1, 11-12, 16 (1984).

This Court has made clear that the FAA's "liberal federal policy favoring arbitration" applies fully in the employment context. In cases like *Perry*, *Gilmer*, and *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001), this Court has held that mandatory, pre-dispute agreements to arbitrate employment-related causes of action, including statutory claims, are to be "rigorously enforced" under the FAA. *See Perry*, 482 U.S. at 490. Nothing about arbitration, the Court explained in *Gilmer*, makes it an inherently inferior method of protecting employees' legal rights. On the contrary, arbitration offers all parties – employees as well as employers – significant advantages over litigation, including "simplicity, informality, and expedition." *Gilmer*, 500 U.S. at 31 (citation omitted).

B. Factual Background

1. Petitioners Insurance Company of North America ("INA") and CIGNA Insurance Company employed respondent Paul Leodori as an attorney for four years.[1] App. 3a, 24a. He had previously worked in substantial law firms as a litigator, having fifteen years experience as an

[1] CIGNA Corporation, Insurance Company of North America and CIGNA Insurance Company will be referred to collectively as "CIGNA" and no distinction will be made among them for purposes of this Petition unless otherwise noted.

attorney. While employed by CIGNA, Leodori received CIGNA's long-standing and widely distributed arbitration policy by way of (1) two handbooks ("L&PA Handbook" and "You and Cigna") distributed to him (and other employees) in June and July 1998 and (2) the companies' Arbitration Policy, which was distributed to him (and all other employees) in August 1996. *Id.* at 3a-5a.

Each of these documents unequivocally states that arbitration is a "legally binding" "term and condition of [Leodori's] continued employment" and that "arbitration must be used rather than going to court" for "serious employment-related disputes." *Id.* at 4a-5a. The L&PA Handbook states:

> In the interest of fairly and quickly resolving employment-related disagreements and problems, CIGNA's policy is that arbitration by a neutral third-party is the required and final means for the resolution of any serious disagreements and problems not resolved by the company's internal dispute resolution process. Both CIGNA and the employee will be bound by any decision made by a neutral arbitrator. If the employee or CIGNA do not abide by the arbitrator's decision, either party may go to court to enforce the arbitrator's decision, but **arbitration must be used before going to court**. This policy is intended to prevent an employee from going to court over employment-related disputes; it is not intended to take away any other rights.

Id. (emphasis in original). Each of these documents also describes the types of claims covered, including discrimination and statutory claims. *Id.* at 5a-6a.

An employee who pursues a claim under the CIGNA arbitration program has the same rights as one pursuing the same claim in court except that there will not be a jury and the rules of evidence do not apply. App. 5a-6a. The arbitration proceeds under the auspices of the American Arbitration Association. The arbitrator must follow the law, make findings of fact and conclusions of law, and render a written opinion. The remedies are identical to those available in court. CIGNA also pays the fees of the arbitrator, with the employee paying only a $100 application fee.

In June 1998, Leodori signed an acknowledgment that he received the L&PA Handbook and that he accepted "responsib[ility] for knowing the policies and information." *Id.* at 5a. In September 1998, he signed a receipt acknowledging he received and reviewed the You and CIGNA handbook. *Id.* at 6a. He continued to work for INA after he received each copy of the arbitration policy and after he signed the receipts. He did not object to the arbitration policy.

When You and CIGNA was first distributed in July 1998, the printed handbook receipt stated the employee understood that "by accepting employment and being eligible to receive increases in compensation and benefits," the employee agreed the employment was at-will and employment-related disputes had to be resolved through arbitration rather than court. *Id.* at 6a-7a. Subsequently, a revised receipt was distributed, together with a cover memorandum that offered employees the opportunity to sign a "simplified" receipt, or in the event an employee had already signed the first receipt, to do nothing. *Id.* at 8a-9a. The memorandum stated clearly that both the initial and the revised employee handbook receipts were intended to

"ensur[e] that everyone is fully aware of company policy." *Id.* Nothing in the second receipt suggested the companies were changing any of the provisions of You and CIGNA, including the arbitration policy. *Id.*

Respondent does not deny that he was aware of the arbitration policy. He even alleges in his Complaint the binding effect of You and CIGNA and the L&PA Handbook: "[t]he terms and conditions set forth in the L&PA Handbook were explicitly incorporated into the employment agreement between Plaintiff and CIGNA . . . " and "[t]he You and CIGNA employee handbook constituted a contract of employment between Plaintiff and INA and, alternatively, CIGNA Insurance." He did allege, however, that he should not be bound by the CIGNA arbitration policy because the receipt he signed for the employee handbook did not contain express reference to the policy. *Id.* at 5a.

2. Respondent was terminated by CIGNA in May 1999. App. 9a. Prior to his termination, respondent claimed he had discovered misconduct by certain officers and employees of the company. After he reported his allegations internally, the company retained retired Chief Judge Arlin Adams of the Third Circuit to investigate, with respondent's explicit approval. Judge Adams concluded that respondent's allegations of misconduct were "not supported by the facts . . . ascertained or the law . . . researched." CIGNA terminated respondent after Judge Adams rendered his report and findings. *Id.*

3. In February 2000, respondent filed a complaint in New Jersey trial court alleging that he had been terminated because he had uncovered and reported misconduct by company officials. *Id.* Respondent asserted a claim under the New Jersey Conscientious Employee Protection

Act, N.J. Stat. Ann. § 34:19-1 to -8 (West 2000) ("CEPA"), and claims for wrongful termination, breach of contract and defamation. Respondent's complaint named as defendants his former employers, their parent company CIGNA Corporation and numerous present or former employees, officers and directors of these companies. In June 2000, respondent filed a second complaint repeating essentially the same allegations, but adding as defendants Judge Adams, his law firm, and an associate who assisted in his investigation. *Id.*

a. On the filing of respondent's first complaint, petitioners invoked the FAA and moved to stay the matter pending arbitration. App. 9a. On May 8, 2000, the New Jersey trial court found "there is a valid and binding agreement between the Plaintiff and the Defendant companies" requiring respondent to arbitrate his claims, and dismissed the first complaint. *Id.* at 38a-39a. Respondent did not then agree to arbitrate, but instead filed his second, virtually identical complaint, with new defendants. *Id.* at 9a. On August 1, 2000, the trial court dismissed the second complaint for the same failure to arbitrate, and thereafter denied his motion for reconsideration. *Id.* at 9a-10a, 40a.

b. The New Jersey Appellate Division reversed. App. 23a. The Appellate Division looked only at the language contained in the receipt forms signed by respondent, but not the handbooks that the forms acknowledged, to determine whether an agreement to arbitrate had been reached. *Id.* at 35a-36a. The court then concluded the agreement to arbitrate was unenforceable because "[t]he language of neither [signed receipt] is expressive of an 'actual intent' to waive statutory claims." *Id.* at 35a. In short, the Appellate Division held that only a signed

document containing specific language evidencing the agreement to arbitrate on the same page as the signature would be sufficient to establish an agreement to arbitrate. *Id.* at 34a-35a.

c. The New Jersey Supreme Court accepted petitioners' petition for discretionary review. The petition was based primarily on the grounds that the Appellate Division's decision was preempted by the FAA. The Supreme Court affirmed the Appellate Division's decision. *Id.* at 10a.

The New Jersey Supreme Court agreed with petitioners that the "You and CIGNA" handbook received by respondent "unambiguously sets forth the drafter's intention to arbitrate all employment-related claims, including those that might be asserted under CEPA." App. 13a. The court also recognized that respondent had received that handbook and signed an acknowledgment that he had "reviewed the material" on CIGNA's "policies, programs and services for employees." *Id.* at 6a. The court nevertheless held that the arbitration agreement contained in the handbook (and in other communications with respondent) was not enforceable because it was not an "explicit, affirmative agreement that unmistakably reflects the employee's assent [to arbitrate claims]." *Id.* at 16a. The court held, "an arbitration provision cannot be enforced against an employee who does not sign or otherwise explicitly indicate his or her agreement to it." *Id.* at 17a. "Without plaintiff's signature on the Agreement that accompanied the 'You and CIGNA' handbook, we cannot enforce the arbitration provision unless we find some other explicit indication that the employee intended to abide by that provision." *Id.* at 16a. Despite the extensive – and entirely one-sided – record of circumstantial evidence

establishing the existence of respondent's knowledge of and assent to the agreement to arbitrate as a condition of his continued employment, in the "[a]bsen[ce] [of] plaintiff's signature[,]" the court did not find an "unmistakable indication that the employee affirmatively had agreed to arbitrate his claims." *Id.* at 18a. Although the court suggested that a signature was not an absolute requirement, the court did not explain what, if anything, an employer could do, short of obtaining a formally signed agreement, to satisfy the "unmistakable" assent requirement for enforcement of an arbitration agreement. *See id.* at 16a-17a. The court did make clear, however, that implied consent, derived from knowledge that one's continued employment is conditioned on agreement to arbitrate employment-related claims, will not suffice to render the agreement enforceable. *Id.* at 18a.

The New Jersey Supreme Court previously had made clear that, as a generally applicable rule of contract law, contracts may be enforced so long as the evidence, including circumstantial evidence, establishes that the parties voluntarily agreed to be bound. *See generally Wanaque Borough Sewerage Auth. v. Twp. of West Milford,* 677 A.2d 747, 752 (N.J. 1996) ("contracts implied in fact are no different than express contracts, although they exhibit a different way or form of expressing assent than through statements or writings."); *Restatement (Second) of Contracts* § 19 (1981) ("The manifestation of assent may be made wholly or partly by written or spoken words or by other acts or by failure to act."); 2 Richard A. Lord, *Williston on Contracts* § 6:43 at 457-65 (4th ed. 1991) ("the offeree's action naturally indicates assent" and "he may become bound even absent his signature" because "[t]he acceptance of a paper which purports to be a contract

ordinarily is sufficient to indicate an assent to its terms"). Under this rule, assent to a contractual obligation may be implied from the circumstances. *See Troy v. Rutgers,* 774 A.2d 476, 482 (N.J. 2001); *Restatement (Second) of Contracts* § 19 (1981); *see also Restatement (Second) of Contracts* § 4 cmt. a (1981) ("Just as assent may be manifested by words or other conduct, sometimes including silence, so intention to make a promise may be manifested in language or by implication from other circumstances, including course of dealing or usage of trade or course of performance"). In *Woolley v. Hoffman-LaRoche, Inc.*, 491 A.2d 1257, *modified*, 499 A.2d 515 (N.J. 1985), the court applied that rule to hold that an employer may be bound by a promise implied from an employment manual to terminate an employee only for cause. *Id.* at 1267. The court in this case distinguished *Woolley* on the ground that its "implied-contract doctrine focuses on an employer's obligation to its employees, not vice-versa." App. 15a. In short, a special rule of enforceability – an "unmistakable" assent doctrine – attaches when an employee's consent to an arbitration agreement is involved. By contrast, the usual rules of contract enforceability apply to the employer's agreement concerning conditions of employment, just as they apply to the enforceability of any other standard contract under New Jersey law.

REASONS FOR GRANTING THE WRIT

This Court should grant *certiorari* because the decision below conflicts with the FAA and with this Court's prior decisions construing the FAA, especially *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681 (1996). Those cases hold that the FAA preempts any state law that

makes arbitration agreements more difficult to enforce than other types of contracts. The decision of the New Jersey Supreme Court, adopting an "unmistakable" assent rule to be applied to all employment arbitration agreements, does exactly that. Not surprisingly, the court's decision also conflicts with the decisions of other state supreme courts and federal circuits – including a decision of the Second Circuit holding an identical "unequivocal" assent rule preempted. Yet despite the evident clarity of this Court's decisions holding that arbitration agreements must be treated on the same legal terms as those applicable to other contracts, the decision below is not the only decision to run counter to this Court's mandate – the preemption mandate of the FAA. Most courts adhere to that mandate; others do not. *Certiorari* is also warranted to resolve that conflict.

The lower court conflict underscores the recurring nature of the issue presented here as well as its exceptional importance. In particular, the issue of the enforcement of an arbitration agreement made by way of an employee handbook or widely distributed written policy has national significance because of the prevalence of multi-state employers and the differing standards that are now applied to the enforceability of such agreements. While presumably no state legislature would now think to enact a statute explicitly providing, for example, that "Arbitration agreements are enforceable only if they are signed or otherwise include an unmistakable indication of the party's agreement to arbitrate," *but see infra* note 7, some courts appear more willing to reach just the same result by judicial pronunciation. Such decisions undermine the expectation of essentially uniform treatment of the enforceability of employment arbitration agreements that

multi-state employers expect under the FAA – and to which they are entitled.

I. REVIEW SHOULD BE GRANTED BECAUSE THE DECISION BELOW CONFLICTS WITH THE FAA AND WITH DECISIONS OF THIS COURT

The FAA generally requires states to enforce arbitration agreements, regardless of any state law or judicial decision to the contrary. *See Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 281 (1995). Section 2 of the FAA, however, includes a "saving clause," which provides that a state court may refuse to enforce an arbitration clause "upon such grounds as exist at law or in equity *for the revocation of any contract*." 9 U.S.C. § 2 (emphasis added); *see Perry v. Thomas*, 482 U.S. 483, 489-90 (1987); *Southland Corp. v. Keating*, 465 U.S. 1, 10-11 (1984). As this Court has stated in numerous decisions, the fundamental rule of § 2, including its saving clause, is that state law must "place arbitration agreements upon the same footing as other contracts." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991); *see also Allied-Bruce*, 513 U.S. at 271; *Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 474 (1989); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 511 (1974).

In *Doctor's Associates*, this Court applied that fundamental rule to invalidate a Montana statute that required an agreement containing an arbitration provision to state on the first page of the agreement that any disputes under the contract were subject to arbitration. The Court explained that under § 2 a state law may operate to invalidate an arbitration agreement only "*if* that law arose to govern . . . the validity, revocability, and

enforceability of *contracts generally*." 517 U.S. at 686-87 (second emphasis added) (citation omitted). "Thus, *generally applicable contract defenses*, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening § 2." *Id.* (emphasis added) (citations omitted). The Court concluded that the Montana statute "directly conflicts with § 2 [of the FAA] because the State's law conditions the enforceability of arbitration agreements on compliance with a special notice requirement not applicable to contracts generally." *Id.* at 682, 688 ("Montana's law places arbitration agreements in a class apart from 'any contract,' and singularly limits their validity.").

So it is here. The decision of the New Jersey Supreme Court conditions the enforceability of arbitration agreements on compliance with the special consent requirement – *i.e.*, an actual signature or otherwise "unmistakable" indication of assent – that is not applicable to contracts generally. *See* discussion *infra* at 16. The decision's special "prescription" for arbitration agreements "is thus inconsonant with, and is therefore preempted by, the federal law." *Doctor's Associates,* 517 U.S. at 688. It is also inconsonant with this Court's decisions, including but certainly not limited to *Doctor's Associates*, and therefore warrants *certiorari*.

It is no answer either to the question of preemption or to the need for *certiorari* that the court below asserted that its special "unmistakable" assent was drawn from "familiar contract principles." App. 13a, 18a. This Court's decisions have made clear that a state court cannot justify a rule uniquely burdening the enforcement of an arbitration agreement merely by articulating the special rule in terms of a generally applicable contract defense such as unconscionability, fraud, and duress. *See Doctor's Associates*, 517

U.S. at 687 and n.3; *Perry*, 482 U.S. at 492 n.9. It is true that if the state court "assert[s] as a basis for its decision [refusing enforcement of the arbitration agreement] a generally applicable principle ... governing *any* ... *contract*[,]" the FAA will not intervene. *Doctor's Associates*, 517 U.S. at 687 n.3 (emphasis added). But if that rule would not be applied the same way to "any contract," then it is plainly being used as a special burden on the enforcement of arbitration agreements. As the Court has explained, "[a] court may not . . . in assessing the rights of litigants to enforce an arbitration agreement, construe that agreement in a manner different from that in which it otherwise construes nonarbitration agreements under state law." *Perry*, 482 U.S. at 492 n.9. Thus, if the state law principle applied to bar enforcement "takes its meaning precisely from the fact that a contract to arbitrate is at issue," the FAA bars application of the principle. *Id.*[2]

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[2] This Court has followed an analogous principle in determining whether a contract-law rule with common-law roots is, when applied uniquely to insurance contracts, a genuine contract-law rule or a special rule specific to insurance contracts, for purposes of determining whether the rule is preempted by ERISA or is saved from preemption as a law that "regulates insurance." In *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 50 (1987), the Court held that Mississippi's tort of "bad faith" is *not* a law that regulates insurance, because under Mississippi law, "[a]ny breach of contract, and not merely breach of an insurance contract, may lead to liability for punitive damages under [the Mississippi common law of bad faith]." By contrast, in *UNUM Life Ins. Co. of America v. Ward*, 526 U.S. 358, 371 (1999), the Court held that a special "notice-prejudice" rule applied by a California statute uniquely to insurance contracts *was* a law that "regulates insurance," because even though it was an application of a certain traditional contract maxim, it was "an application of a special order, a rule mandatory for insurance contracts ... not a general principle guiding a court's discretion in a range of [contract enforcement] matters."

Whether by specially devised rule or by discriminatory application of an otherwise generally applicable principle, the FAA "preclude[s] States from singling out arbitration agreements for suspect status." *Doctor's Associates*, 517 U.S. at 687.

There is no doubting that the "unmistakable" assent rule adopted by the New Jersey Supreme Court to bar enforcement of the arbitration agreement in this case is not a "generally applicable principle" governing all New Jersey contracts. *Doctor's Associates*, 517 U.S. at 687 n.3. To the contrary, the rule plainly constitutes a strong judicial "thumb on the scale" favoring an employee trying to resist the enforcement of an arbitration agreement – an advantage not conferred on other parties to other contracts under New Jersey law. Well-established contract law in New Jersey (and elsewhere) does not require that the acceptance of an offer or unilateral contract be proven by an unmistakable assent; rather, the standard is one of a preponderance of the evidence. *See In re Hecker,* 538 A.2d 354, 356 (N.J. 1988) (recognizing that the standard of proof required to sustain a judgment based on contract law is a preponderance of the evidence). Other personnel policies have also been enforced under New Jersey law without proof of unmistakable assent or a writing signed by the employee if the policies were clearly written and widely disseminated to the workforce or the plaintiff employee received the policy, assuming continued employment. *Woolley v. Hoffman-LaRoche, Inc.*, 491 A.2d 1257, *modified,* 499 A.2d 515 (N.J. 1985); *Witkowski v. Thomas J. Lipton, Inc.,* 643 A.2d 546, 553 (N.J. 1994).

Indeed, the primary precedent discussed in the *Woolley* opinion, stands for the proposition that an employee need *not* give "unmistakable" assent before an

implied promise in an employment manual will be enforced against the employer. In a long line of cases going back almost 20 years, New Jersey courts have treated a handbook/personnel manual as a unilateral contract which could be accepted by way of an implied assent, such as an employee's continued employment without objection. *Woolley*, 491 A.2d at 1267 ("the manual is an offer that seeks the formation of a unilateral contract—the employees' bargained-for action needed to make the offer binding being their continued work when they have no obligation to continue."); *Witkowski*, 643 A.2d at 550 ("An established employment manual that expresses 'company-wide employer policy' may give rise to an implied contract of employment if its provisions contain an express or implied promise concerning the terms and conditions of employment." (quoting *Gilbert v. Durand Glass Mfg. Co.*, 609 A.2d 517, 522 (N.J. Super. Ct. App. Div. 1992)).[3]

The court's principal ground for distinguishing *Woolley* is a prescription for FAA preemption: "*Woolley*'s implied-contract doctrine focuses on an employer's obligation to its employees, not vice-versa." App. 15a. This Court's cases have repeatedly rejected efforts to justify state anti-arbitration rules on generalized assumptions about power and status differences between employers and employees. *See Gilmer*, 500 U.S. at 33 (explaining that "[m]ere inequality in bargaining power" is not a sufficient basis for

[3] The *Woolley* decision was based on earlier New Jersey case law where a promise of pension benefits in a company manual was enforced when the court had found "an offer of a unilateral contract and the employees' continued services as sufficient acceptance and consideration therefore." *Woolley*, 491 A.2d at 1268 (referring to *Anthony v. Jersey Cent. Power & Light Co.*, 143 A.2d 762 (N.J. Super. Ct. App. Div. 1958)).

state anti-arbitration rule); *cf. Circuit City v. Adams*, 532 U.S. 105, 133-140 (2001) (declining to accept similar argument in dissenting opinions).

The New Jersey Supreme Court's treatment of an agreement to arbitrate is completely at odds with well-established general principles of contract formation (particularly in regards to contracts between employers and employees). Personnel policies, other than those relating to job security, are enforceable by employers against employees. *See, e.g., Jason v. Showboat Hotel & Casino*, 747 A.2d 802, 804 (N.J. Super. Ct. App. Div. 2000) (employer is entitled to promulgate and enforce its own disciplinary rules and procedures); *Rivera v. Trump Plaza Hotel & Casino,* 702 A.2d 1359, 1360-1361 (N.J. Super. Ct. App. Div. 1997) (employer permitted to terminate an employee for violation of its grooming policy).

Oral contracts and oral personnel policies are also enforceable under New Jersey law. *See Radiological Soc'y of New Jersey v. Sheeran*, 418 A.2d 1300, 1305-06 (N.J. Super. Ct. App. Div. 1980), *cert. denied,* 434 A.2d 66 (N.J. 1981) (a contract need not be in writing as long as the parties have mutually agreed to do something); *Gilbert v. Durand Glass Mfg. Co.,* 609 A.2d 517, 522 (N.J. Super. Ct. App. Div. 1992) (oral personnel policies are enforceable if widely disseminated). Thus, the New Jersey court's requirement for a document signed by the plaintiff employee evidencing an agreement to arbitrate is plainly at odds with New Jersey contract law.[4]

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[4] The evidence that respondent had agreed to arbitration was so overwhelming that it is hard to conceive of a situation, other than where the employee admitted he had agreed to arbitration at an earlier

(Continued on following page)

The unique status of an "unmistakable" consent-to-arbitration requirement is evident not only from New Jersey case law, but also from the precedents of this Court. In *Wright v. Universal Maritime Serv. Corp.*, 525 U.S. 70, 80-82 (1995), this Court held that a union could not waive its members' rights to a judicial forum in favor of arbitration for the adjudication of individual statutory claims, at least absent a "clear and unmistakable waiver" of the right. In so holding, the Court explicitly distinguished the standard applicable in individual waiver situations, as in *Gilmer* and this case: "*Gilmer* involved an individual's waiver of his own rights [to a judicial forum], rather than a union's waiver of the rights of represented employees – and hence *the 'clear and unmistakable' standard was not applicable*." *Id.* at 80 (emphasis added); *see also First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995) ("When deciding whether the parties agreed to arbitrate a certain matter . . . courts generally . . . should apply *ordinary* state-law principles that govern the formation of contracts.") (emphasis added).

The New Jersey Supreme Court's decision to apply such a requirement to the individual waiver is inconsistent with the recognition in *Wright* that a "clear and unmistakable" consent requirement is *not* an "ordinary" rule of contract law, but a special rule applied only in certain situations when policy reasons justify limitations

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time, where an employer could prove unmistakable assent, absent a signed agreement. For example, there was no dispute respondent had received the arbitration policy several times, had signed acknowledgements that he had reviewed the handbooks where the policy appeared, and had continued to work without objection to the policy. *See supra* pp. 4-7.

on the enforcement of certain contracts.[5] This Court has recognized the same point in other contexts.[6] The essential purpose of the FAA is to prohibit States from treating arbitration agreements as a unique species of contract, subject to special rules applied, if at all, to contracts with

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[5] For this reason, the court's repeated references to the arbitration clause as a "waiver of rights" provision does not justify the differential enforcement rule applied to the provision. Even though one New Jersey precedent cited by the court has held that a waiver of *statutory* rights "must be clearly and unmistakably established," App. 14a (citing *Red Bank Reg'l Educ. Ass'n v. Red Bank Reg'l High Sch. Bd. of Educ.*, 393 A.2d 267, 276 (N.J. 1978)), an arbitration clause is *by definition* a waiver of the right to seek a remedy in a judicial forum. *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985). The decision below thus applies the waiver of rights rule specifically because "a contract to arbitrate is at issue," an approach precluded by the FAA. *Perry*, 482 U.S. at 492 n.9. If a burden on enforceability could be imposed as a specific application of a "waiver of rights" rule, then a state could altogether bar arbitration through a rule generally barring the waiver of rights. But that result would fly directly in the face of the FAA's fundamental policy of requiring courts to enforce arbitration agreements.

[6] For instance, this Court's cases applying the "unmistakability doctrine" to the enforceability of state obligations under the Contract Clause of the U.S. Constitution recognize that such a special consent rule is a departure from normal contract rules, justified in those cases because of the unique nature of a state potentially surrendering sovereign rights through contract. *See, e.g., U.S. v. Winstar Corp.*, 518 U.S. 839, 871, 879 (1996) (plurality opinion) ("doctrine of unmistakability" is not applicable to just "any contract claim against the Government," but "turns on whether enforcement of the contractual obligation alleged would block the exercise of a sovereign power of the Government"); *id.* at 910-11 (Breyer, J., concurring) (contrasting "unmistakability doctrine" with "rules of contract interpretation" applicable in "ordinary cases"). By adopting the same special consent rule for arbitration agreements, New Jersey treats arbitration agreements different from other contracts in the same way this Court's Contract Clause cases treat state contracts different from other contracts.

"suspect status." *Doctor's Associates*, 517 U.S. at 687. *Certiorari* should be granted because the decision below directly conflicts with the fundamental mandate of the FAA and the decisions of this Court recognizing and applying that mandate.

II. REVIEW SHOULD BE GRANTED TO RESOLVE A CONTROVERSY IN THE COURTS OVER THE PERMISSIBILITY OF SPECIAL RULES LIMITING THE ENFORCEABILITY OF ARBITRATION AGREEMENTS

It is not surprising that the decision below conflicts not only with the decision of this Court, but also with decisions of federal circuits and other state courts of last resort rejecting efforts to apply special contract rules limiting the enforceability of arbitration agreements.

The decision below conflicts squarely with a decision in the Second Circuit finding preempted a state "unequivocal" consent rule indistinguishable from the rule adopted by the New Jersey Supreme Court. *See Progressive Cas. Ins. Co. v. C.A. Reaseguradora Nacional De Venezuela*, 991 F.2d 42, 46 (2d Cir. 1993). The New York case law at issue in that case held that "parties will not be held to have chosen arbitration in the absence of an express, unequivocal agreement to that effect." *Id.* at 46 (internal quotation marks omitted). The Second Circuit held that because "New York law requires that nonarbitration agreements be proven only by a mere preponderance of the evidence[,]" the "express, unequivocal" consent rule conflicted with this Court's decision in *Perry* prohibiting "discriminatory treatment of arbitration agreements," and thus was preempted. *Progressive*, 991 F.2d at 46. It is

impossible to reconcile the analysis and result in *Progressive* with the analysis and result here.

Other cases have invalidated arbitration-specific rules almost as analogous. In *David L. Threlkeld & Co. v. Metallgesellschaft Ltd.*, 923 F.2d 245, 249 (2d Cir.), *cert. dismissed,* 501 U.S. 1267 (1991), the Second Circuit invalidated a state statute requiring arbitration agreements – and only arbitration agreements – to contain or be accompanied by a written acknowledgement of arbitration, displayed prominently and signed by both parties. A Texas appellate court likewise found preempted by the FAA a state-mandated signature requirement for arbitration agreements, which is tantamount to the requirement adopted by the decision below. *Palm Harbor Homes, Inc. v. McCoy*, 944 S.W.2d 716, 721 (Tex. Ct. App. 1997).

The decision below also conflicts with federal circuit and state supreme court decisions invalidating other types of state-law rules applied uniquely to arbitration agreements. *See Ex Parte McNaughton*, 728 So. 2d 592 (Ala. 1998) (invalidating "mutuality" requirement); *Harris v. Green Tree Fin. Corp.*, 183 F.3d 173 (3d Cir. 1999) (same); *KKW Enters., Inc. v. Gloria Jean's Gourmet Coffees Franchising Corp.*, 184 F.3d 42, 51 (1st Cir. 1999) (because state law regulating franchise agreements "does not apply to *any* contract" it is "not generally applicable" and is thus preempted by FAA); *Doctor's Associates, Inc. v. Hamilton*, 150 F.3d 157, 163 (2d Cir. 1998) (same); *OPE Int'l LP v. Chet Morrison Contractors, Inc.*, 258 F.3d 443, 447 (5th Cir. 2001) (state law applied only to forum selection in construction contracts). Although the particular rules at issue in such cases differ from the rule adopted here, the analysis is irreconcilable: if such cases correctly hold that the FAA preempts state laws imposing discriminatory

burdens on the enforcement of arbitration agreements, then the decision of the New Jersey Supreme Court is necessarily incorrect.

Similarly, the New Jersey decision conflicts with the decisions of some courts that have considered the enforceability of arbitration agreements made by way of policies disseminated in employee handbooks or widely distributed policies. *See Tinder v. Pinkerton Sec.*, 305 F.3d 728, 736 (7th Cir. 2002) (arbitration agreement enforceable as to Title VII claims even though policy did not exist at time employee was hired, and employee did not sign any document and could not opt out of policy); *Blair v. Scott Specialty Gases*, 283 F.3d 595, 603-04 (3d Cir. 2002) (mandatory arbitration provision placed in handbook acknowledged by employee held enforceable as to Title VII and state statutory discrimination claims); *Hightower v. GMRI, Inc.*, 272 F.3d 239, 242 (4th Cir. 2001) (arbitration policy enforceable as to Title VII claims where employee acknowledged receiving the written policy and continued working until termination).

At the same time, however, the courts are not entirely lined up against the New Jersey Supreme Court on this issue – which only makes more urgent the need for *certiorari* to bring uniformity to the law. In contrast to the majority of decisions, discussed above, which have followed the clear preemption/nondiscrimination requirement of the FAA, a number of decisions have imposed various limitations on the enforceability of arbitration agreements that are not applied to other contracts under state law. *Compare Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669, 681 (Cal. 2000) (agreement to arbitrate unenforceable under California law because of non-mutuality), *and Circuit City Stores, Inc. v.*

Adams, 279 F.3d 889 (9th Cir.), *cert. denied*, 535 U.S. 1112 (2002) (same), *with Prudential Mut. Life Ins. Co. v. Vars, Pave, McCord & Freedman*, 77 Cal. Rptr. 2d 479, 490 (Cal. Ct. App. 1998) (mutuality not required under California law for non-arbitration agreement so long as sufficient consideration present), *and compare Nelson v. Cyprus Bagdad Copper Corp.*, 119 F.3d 756, 761-62 (9th Cir. 1997) (signing of handbook acknowledgment and continued employment insufficient under federal law to constitute knowing waiver of right to pursue ADA claims in court), *with id.* at 763 (Rymer, J., dissenting) (waiver sufficient under state law); *see also Ramirez-De-Arellano v. American Airlines, Inc.*, 133 F.3d 89, 90-91 (1st Cir. 1997) (failing to apply state law to determine enforceability of agreement to arbitrate FLSA claims).

These decisions are no less erroneous than the decision below. All of them conflict with the FAA and with the decisions of this Court. While *certiorari* is always warranted to settle an unsettled area of law, it is all the more so here, where the law has *already been settled* by this Court, time and again – or so one might have thought. Eight decades have not been enough for the message of the FAA – arbitration agreements must be enforced on an equal footing with all other contracts – to sink in. Review and reversal of the decision below would be a proper and effective way to send that important message one more time.

III. REVIEW SHOULD BE GRANTED TO ENSURE THAT MULTI-STATE EMPLOYERS AND OTHER ENTITIES ARE NOT SUBJECTED TO VARYING STATE-LAW RULES GOVERNING THE ENFORCEABILITY OF ARBITRATION AGREEMENTS

As discussed above, the FAA establishes a "liberal federal policy favoring arbitration agreements," *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983), one that applies with full force to agreements to arbitrate employment disputes, *see Circuit City*, 532 U.S. at 119; *Gilmer*, 500 U.S. at 30. The New Jersey court's much more jaundiced view of arbitration in the employment context is palpably reflected in the court's effort to distinguish its earlier "implied consent" contract case as involving only the rights of employees *vis-à-vis* their employers, and not vice-versa. App. 15a. That attitude runs directly contrary to the text and spirit of the FAA, but, as the prior section showed, it is not uncommon among courts at both the federal and state levels. The decision in this case represents only the latest attempt to circumvent the FAA where a court believes a dispute should be decided by a jury (or judge) rather than by an arbitrator.[7] What some courts may not appreciate is that judicially-prescribed rules discriminating against arbitration agreements are preempted by the FAA to the same

[7] The New Jersey Legislature is also considering a bill that would prohibit pre-dispute arbitration agreements. The Assembly has passed the proposed amendment to the New Jersey Law Against Discrimination, N.J. Stat. Ann. §§ 10:5-1 to -49 (West 2002), and the bill is presently before the state Senate. *See* Assem. 2681, 210th Leg. (N.J. 2002). Such legislation clearly is preempted by the FAA.

extent legislative enactments are preempted. *See Doctor's Associates*, 517 U.S. at 687 n.3 (state court may not "effect what . . . the state legislature cannot." (quoting *Perry*, 482 U.S. at 492 n.9)).

The decision in this case will have effects well beyond the parties and the dispute here. CIGNA, like many employers, has employees in numerous states. As a result of the New Jersey court's decision in this case, both CIGNA and its employees must now have differing expectations regarding the enforceability of arbitration agreements depending solely on where they live. Although this might be a predictable result insofar as arbitration agreements necessarily must be enforced in accordance with ordinary principles of state law, in fact most states follow fairly common standards for determining whether a party has knowingly accepted a contractual obligation. Certainly *no* state of which we are aware requires a plaintiff in a standard contract action to point to "explicit," "affirmative," "unmistakable" evidence of consent. Consent can be implied from the circumstances under uniformly recognized principles of contract law.

The New Jersey Supreme Court's adoption of a different, more stringent rule for arbitration agreements renders it more difficult for employers to adopt such agreements. Obtaining an actual signature from each one of thousands of employees reflecting affirmative consent to arbitrate claims, as the court's opinion all but requires, can be a much more daunting task than the opinion recognizes. Yet employers in CIGNA's position would have to do no less, or risk having a "two track" system for resolution of employment claims, which would undermine the very point of establishing a uniform, efficient, and less-expensive system of private dispute resolution. Those

problems are already serious enough under the decision in this case given New Jersey's status as the home to many corporate headquarters and sizable branch offices; they will be magnified manifold if the decision is followed by other courts.

But there is no reason for this Court to await such a day. Other courts are already allowing states to enforce rules that discriminate against arbitration, establishing a ripe and serious conflict justifying review on its own terms.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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SUPREME COURT OF NEW JERSEY
A-120 September Term 2001

PAUL LEODORI,

Plaintiff-Respondent,

v.

CIGNA CORPORATION, CIGNA INSURANCE COMPANY, INSURANCE COMPANY OF NORTH AMERICA, WILSON TAYLOR, THOMAS WAGNER, GERALD ISOM, JAMES ENGEL, JOHN MURPHY, DAVID GOLD, BEVERLY SHERBONDY, STEPHANIE MIDDLETON, ANTHONY SMITH, ALFRED DECRANE, JAMES J. RITCHIE and ROBERT CAMPBELL,

Defendants-Appellants,

and

JOHN DOES 1-5, and ABC CORPORATIONS 1-5, said individuals and corporations being fictitious,

Defendants.

PAUL LEODORI

Plaintiff-Respondent,

v.

CIGNA CORPORATION, CIGNA INSURANCE COMPANY and INSURANCE COMPANY OF NORTH AMERICA,

Defendants-Appellants,

and

SCHNADER HARRISON SEGAL & LEWIS, LLP, ARLIN ADAMS, LISA DETWEILER, WILSON TAYLOR, THOMAS WAGNER, GERALD ISOM, JAMES ENGEL, JOHN MURPHY, DAVID GOLD, BEVERLY SHERBONDY, STEPHANIE MIDDLETON, ANTHONY SMITH, JAMES J. RITCHIE, ROBERT CAMPBELL, DENNIS KANE, ALFRED DECRANE, PETER LARSON, JOSEPH NEUBAUER, HAROLD WAGNER, CAROL COX WAIT, JOHN DOES 1-10 and ABC CORPORATIONS 1-10, said individuals and corporations being fictitious,

Defendants.

Argued December 2, 2002 – Decided February 13, 2003

On certification to the Superior Court, Appellate Division.

Edward T. Ellis and *Michael K. Furey* argued the cause for appellants (*Riker, Danzig, Scherer, Hyland & Perretti*, attorneys for CIGNA Corporation, Wilson Taylor, Thomas Wagner, Gerald Isom, John Murphy, Beverly Sherbondy, Stephanie Middleton, Anthony Smith, Alfred Decrane, James J. Ritchie and Robert Campbell and *Montgomery, McCrackern, Walker & Rhoads,* attorneys for CIGNA Insurance Company, Insurance Company of North America, James Engel and David Gold, attorneys; *Mr. Ellis, Mr. Furey, Janice Greenberg Dubler* and *Michael H. Wilck,* on the briefs).

Paul Leodori argued the cause *pro se.*

The opinion of the Court was delivered by

VERNIERO, J.

This is an employment action. Plaintiff alleges that his employer fired him in violation of the New Jersey Conscientious Employee Protection Act, *N.J.S.A.* 34:19-1 to -8 (CEPA). The merit of that allegation is not before us. We are called on solely to evaluate the enforceability of a waiver-of-rights provision contained in an employee handbook distributed by defendant. That provision requires employees to resolve employment-related claims by submitting them to an arbitrator rather than to a jury, which is otherwise their right. Although the provision is unambiguous, we are unable to conclude that plaintiff clearly had agreed to it. We thus hold that the waiver is invalid as applied to this plaintiff.

I.

Plaintiff Paul Leodori began working for Insurance Company of North America (INA) in June 1995. INA's sister company is CIGNA Insurance Company (CIGNA). (Unless otherwise indicated, we shall refer to INA and CIGNA collectively as defendant or the company.) During the course of his employment, plaintiff served as an in-house attorney at INA's Division of Legal & Public Affairs (L & PA). In August 1994, nearly a year before plaintiff had begun his employment, L & PA adopted an arbitration policy that required arbitration as a final means for resolving employment-related disputes between defendant and its employees. In August 1996, INA sent a revised policy via inter-office mail and U.S. mail to all L & PA employees, including plaintiff. The revised policy also

embraced arbitration as the final method by which defendant and its employees would resolve their disagreements.

A subsequent L & PA handbook contained a similar clause. Defendant distributed that handbook in June 1998 to all employees, including plaintiff. (We recite at length certain excerpts from the L & PA handbook and from other documents because they are critical to the parties' arguments.) The handbook bears this disclaimer:

> This handbook does not alter the "at will" status of your employment. Just as you may terminate your employment at any time for any reason, your employment may be terminated at any time for any reason. Except for the **arbitration policy mentioned in this handbook**, which **is a term and condition of your continued employment**, the policies and practices set forth herein are for your information and guidance. Things change and there is no guarantee that the policies and practices contained herein will not change in the future. The company reserves the right to alter, amend, and make exceptions to this handbook at any time in its sole discretion, with or without prior notice.

The L & PA handbook also contains the following arbitration provision:

> In the interest of fairly and quickly resolving employment-related disagreements and problems, CIGNA's policy is that arbitration by a neutral third-party is the required and final means for the resolution of any serious disagreements and problems not resolved by the company's internal dispute resolution process. Both CIGNA and the employee will be bound by any decision made by a neutral arbitrator. If the

> employee or CIGNA do not abide by the arbitrator's decision, either party may go to court to enforce the arbitrator's decision, but **arbitration must be used before going to court**. This policy is intended to prevent an employee from going to court over employment-related disputes; it is not intended to take away any other rights.

Along with the L & PA handbook, the company distributed an acknowledgment form that states:

> I hereby acknowledge that I have received a copy of the 1998/99 Legal & Public Affairs employee handbook.
>
> I understand this handbook includes information on division policies and programs and that I am responsible for knowing the policies and information. I further understand any of the policies and programs are subject to change at the discretion of senior management and that the handbook and its contents are not a contract of employment.

As is evident, that language does not refer specifically to arbitration. Plaintiff signed the acknowledgment form in June 1998.

In July 1998 defendant distributed to plaintiff and other employees another handbook. That handbook, entitled "You and CIGNA," also contains a purported agreement to arbitrate all employment disputes. It provides, in part:

> The agreement to arbitrate applies to serious employment-related disagreements and problems, which are those that concern a right, privilege, or interest recognized by applicable law. Such serious disputes include claims, demands,

> or actions under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1866, the Civil Rights Act of 1991, the Equal Pay Act, the Age Discrimination in Employment Act, the Employee Retirement Security Act of 1974, the Fair Labor Standards Act, the Rehabilitation Act of 1973, the Americans with Disabilities Act, the Family and Medical Leave Act, and any other federal, state, or local statute, regulation, or common law doctrine, regarding employment discrimination, conditions of employment, or termination of employment.

An acknowledgment form accompanied the "You and CIGNA" handbook, similar to the one that had accompanied the L & PA handbook. It provides: "This is to acknowledge that I have received my copy of the July 1998 employee handbook, You and CIGNA. I have reviewed the material which includes information on policies, programs and services for employees of the CIGNA companies." Plaintiff signed that form in September 1998.

A separate form, entitled "Employee Handbook Receipt and Agreement" (Agreement), also contains a place for an employee to sign. (We cannot discern from the record whether that form is contained on an actual page of the "You and CIGNA" handbook or whether it was distributed or made available to plaintiff separately. Our analysis would be the same under any of those circumstances.) The Agreement states:

> This is to acknowledge that I have received my copy of the July 1998 employee handbook, You and CIGNA. I understand that by accepting employment and being eligible to receive increases in compensation and benefits, I am agreeing to the following two important terms of

> my employment described in You and CIGNA: (1) my employment can be terminated by me or my employer at any time for any reason – therefore, my employment is at the will of either party, and (2) I will use the Company's internal and external employment dispute resolution processes to resolve legal claims against the Company – therefore rather than go to court or to a government agency for a hearing to decide my legal claim, I will submit my employment related legal claims except workers' compensation and unemployment compensation to final and binding neutral third party arbitration. *I understand further that these two terms of my employment replace and supersede any prior agreement concerning these terms and cannot be changed except in writing signed by me and the president of the Company.*
>
> [(Emphasis added).]

Significantly, plaintiff did not sign the Agreement. The signature line in plaintiff's copy was left blank.

Echoing the importance of the Agreement, the opening page of the "You and CIGNA" handbook states, in part:

> This handbook contains only two terms of your employment. They are very important. The first is that your employment is not for any fixed period of time. Just as you can terminate your employment, at any time for any reason, the Company can terminate your employment at any time for any reason. The second is that by accepting employment and being eligible to receive increases in compensation and benefits, you agree that you will not go to court or a government agency for a hearing to decide an employment-related claim. Instead, you will resolve all

> employment related legal disputes (except workers' compensation and unemployment compensation) by going to a neutral third party arbitrator. *Regardless of what anyone may have told you or you may have read before you were hired or after, these two terms of your employment are the full and complete agreement between you and the Company concerning these terms and cannot be changed except by a written agreement between you and your employer signed by the President of the Company.*

Prior to signing the "You and CIGNA" acknowledgment form, plaintiff received an e-mail dated August 17, 1998, which defendant had transmitted to all CIGNA employees. The e-mail states, in part:

> Our recent handling of the employee Handbook receipt and agreement process left a lot to be desired. Virtually all aspects of the communication and distribution process that could have gone wrong did – moreover, the process was too complicated and legalistic. . . . Our goal was – and is – to ensure that everyone who works for CIGNA [has] a clear understanding and commitment to ensuring the successful implementation of the existing policies and programs we have designed to create a respectful and productive work environment in our company. We wanted to be sure that everyone read the Handbook rather than tossing it in the bottom drawer as some may have done in the past.
>
> . . . .
>
> Upon reflection, and based upon your feedback, we are removing the link between signing the Handbook receipt and future compensation and benefits actions. We now believe that the recent

> high level of visibility and dialogue around the Handbook more than meets the test of ensuring that everyone is fully aware of company policy and eliminates the need for potential penalties.
>
> For those of you who have not yet acknowledged receipt of the Handbook, a simplified form similar to those we have used in prior years is available from your supervisor. For those who already have signed the original receipt, you need take no further action; however, if you would like, you can request and sign the revised form.

Plaintiff alleges that during the course of his employment he became aware of actions by certain officers or employees of defendant that he believed were improper or illegal. According to plaintiff, he reported those allegations to the general counsel as well as to others within the company. Thereafter, INA suspended plaintiff with pay and then transferred him to CIGNA's payroll. Defendant hired a retired federal appellate judge to investigate the asserted improprieties. After receiving the former judge's report concluding that neither the facts nor law supported plaintiff's allegations, defendant terminated plaintiff's employment in May 1999.

Plaintiff filed a complaint in the Law Division in February 2000. He alleged, among other things, that defendant had violated CEPA by firing him because of what he had uncovered and reported. The trial court dismissed that complaint, finding that the parties had entered into a binding agreement to arbitrate their dispute. Plaintiff filed a second Law Division complaint in June 2000, asserting virtually the same claims as those alleged in his earlier action. The trial court dismissed that complaint as well. Plaintiff appealed. In an unreported

decision, the Appellate Division reversed the trial court's dismissal of plaintiff's first complaint. As a result, the panel concluded that the second complaint was moot. We granted defendant's petition for certification, 172 *N.J.* 357 (2002), and now affirm.

II.

Two recent decisions of this Court guide our disposition here. In *Garfinkel v. Morristown Obstetrics & Gynecology Associates,* we recognized as settled law "[t]hat parties to an agreement may waive statutory remedies in favor of arbitration[.]" 168 *N.J.* 124, 131 (2001). We stressed, however, that "[t]o enforce a waiver-of-rights provision in this setting, the Court requires some concrete manifestation of the employee's intent as reflected in the text of the agreement itself." *Id.* at 135. Consistent with basic contract law, we also observed that "[i]n interpreting a contract, [i]t is not the real intent but the intent expressed or apparent in the writing that controls." *Ibid.* (internal citations and quotation marks omitted) (second alteration in original).

The subject of the dispute in *Garfinkel* was a waiver-of-rights provision contained in an employment agreement between a physician and his employer. The provision stated that the parties would resolve "any controversy or claim" that arose from the agreement by submitting it to arbitration. *Id.* at 134. Two years after signing the agreement, the physician alleged that his employer had terminated him in violation of the Law Against Discrimination, *N.J.S.A.* 10:5-1 to -42(LAD). We held that the agreement was insufficient to constitute a waiver of remedies under the LAD. *Garfinkel, supra,* 168 *N.J.* at 134. We reasoned

that the language in the waiver provision suggested that the parties had intended only to arbitrate "those disputes involving a contract term, a condition of employment, or some other element of the contract itself." *Ibid.* The language did not, in our view, signal an intention to arbitrate disputes that were governed more broadly by the LAD or by similar statutes. *Ibid.*

We also offered guidance to future parties. We stated:

> The Court will not assume that employees intend to waive [statutory] rights unless their agreements so provide in unambiguous terms. That said, we do not suggest that a party need refer specifically to the LAD or list every imaginable statute by name to effectuate a knowing and voluntary waiver of rights. To pass muster, however, a waiver-of-rights provision should at least provide that the employee agrees to arbitrate all statutory claims arising out of the employment relationship or its termination. It should also reflect the employee's general understanding of the type of claims included in the waiver, *e.g.*, workplace discrimination claims.
>
> [*Id.* at 135.]

We also reviewed a waiver-of-rights agreement in *Martindale v. Sandvik, Inc.*, 173 *N.J.* 76 (2002). The agreement in that case was contained in an application for employment that the plaintiff had completed and signed prior to being hired by the defendant corporation. The relevant provision indicated that the plaintiff had agreed "that all disputes relating to my employment with [the corporation] or termination thereof shall be decided by an arbitrator[.]" *Id.* at 81-82. The provision also stated, "As a condition of my employment, I agree to waive my right to a

jury trial in any action or proceeding related to my employment with [the corporation]." *Id.* at 81.

The threshold issue in *Martindale* was whether an arbitration agreement contained in an employment application was enforceable as a matter of law. To answer that question, the Court turned first to the Federal Arbitration Act (FAA) through which Congress has sought "to place arbitration agreements upon the same footing as other contracts." *Id.* at 84 (internal citation and quotation marks omitted). We then reviewed contract principles from this and other jurisdictions, concluding that an agreement to arbitrate contained in an application for employment "is binding, as would be any other contractual term not contrary to public policy contained in a signed employment application that led . . . to employment." *Id.* at 89.

We also observed that "the FAA specifically permits states to regulate contracts, including contracts containing arbitration agreements under general contract principles; therefore, an arbitration clause may be invalidated 'upon such grounds as exist at law or in equity for the revocation of any contract.'" *Id.* at 85 (quoting 9 *U.S.C.* § 2). As for the actual agreement in *Martindale,* we concluded that its waiver-of-rights provision "not only was clear and unambiguous, it was also sufficiently broad to encompass reasonably [the] plaintiff's statutory causes of action." *Id.* at 96.

In sum, *Garfinkel* and *Martindale* together set forth two overarching tenets. First, consistent with federal law, a state cannot subject an arbitration agreement to more burdensome requirements than those governing the formation of other contracts. Within that framework, a state is permitted to regulate agreements, including those

that relate to arbitration, by applying its contract-law principles that are relevant in a given case. Second, to be enforceable under those principles in New Jersey, a waiver-of-rights provision must reflect that an employee has agreed clearly and unambiguously to arbitrate the disputed claim. Generally, we determine a written agreement's validity by considering the intentions of the parties as reflected in the four corners of the written instrument.

III.

Applying those tenets to the case at hand, we must answer two related questions: Does the relevant waiver-of-rights provision reflect an unambiguous intention to arbitrate a CEPA claim? If yes, does the record before us indicate that plaintiff clearly had agreed to that provision?

The first question requires only a brief discussion. We are satisfied that the clause in the "You and CIGNA" handbook unambiguously sets forth the drafter's intention to arbitrate all employment-related claims, including those that might be asserted under CEPA. (We focus on that handbook because the record fairly demonstrates that defendant intended it to supersede any prior agreement between the parties.) The relevant provision lists numerous federal statutes by name as falling within its purview, in addition to "any other federal, state, or local statute, regulation, or common-law doctrine, regarding employment discrimination, conditions of employment, or termination of employment." That language easily satisfies the requirement that such clauses provide an unmistakable expression of an employee's willingness to waive his or her statutory remedies. *Martindale, supra,* 173 *N.J.* at 95; *Garfinkel, supra,* 168 *N.J.* at 135.

The second question, whether plaintiff actually had agreed to the provision, requires a lengthier discussion. It implicates whether an employee's implied agreement to waive statutory rights is sufficient in these circumstances or whether some explicit, affirmative expression of agreement is needed. In our view, a valid waiver results only from an explicit, affirmative agreement that unmistakably reflects the employee's assent. If not already part of our jurisprudence, that view flows directly from existing case law. *See, e.g., Garfinkel, supra,* 168 *N.J.* at 135 (instructing that when asked to enforce arbitration clause, "[t]he Court will not assume that employees intend to waive [their] rights"); *Red Bank Reg'l Educ. Ass'n v. Red Bank Reg'l High Sch. Bd. of Educ.,* 78 *N.J.* 122, 140 (1978) (declaring that "[t]o be given effect, any such waiver [of statutory rights] must be clearly and unmistakably established"); *Paul v. Timco, Inc.,* ___ *N.J.Super.* ___, ___ (App. Div. 2002) (observing that "[o]ne party to a contract may not unilaterally impose an obligation to arbitrate upon another party to the contract").

Defendant argues that plaintiff's receipt of the handbook and his continued employment at the company constituted an implied but enforceable agreement to abide by the arbitration policy. In support, defendant cites *Woolley v. Hoffmann-La Roche, Inc.,* 99 *N.J.* 284, *modified,* 101 *N.J.* 10 (1985). In *Woolley,* this Court held that "absent a clear and prominent disclaimer, an implied promise contained in an employment manual that an employee will be fired only for cause may be enforceable against an employer even when the employment is for an indefinite term and would otherwise be terminable at will." *Id.* at 285-86. Succinctly stated, "*Woolley* modifies the nature of the employment relationship by imposing an obligation on

the employer to abide by the terms of the manual." *Wade v. Kessler Inst.*, 172 *N.J.* 327, 340 (2002) (citing *Woolley, supra*, 99 *N.J.* at 292).

Defendant's reliance on *Woolley* is misplaced. *Woolley*'s implied-contract doctrine focuses on an employer's obligation to its employees, not vice versa. Defendant misreads a passage from a post-*Woolley* decision, *Nicosia v. Wakefern Food Corp.*, in which we stated: "An employee may not select among the provisions of [an] employment manual to determine which provision should give rise to enforceable contractual obligations." 136 *N.J.* 401, 411 (1994). In other words, when seeking to bind an employer to its discharge procedures, an employee must look beyond an isolated clause and accept the handbook's complete text, including any provision that might relieve the employer from the claimed obligation. *Nicosia* does not suggest that, by merely receiving a handbook that contains an arbitration clause, employees are bound to that clause when they do not seek to enforce it or the handbook generally.

Apart from the inapplicability of its implied-contract doctrine, *Woolley* does not govern for the separate reason, specific to this case, that defendant expressly disclaimed the formation of a *Woolley* contract. As noted, the opening page of the "You and CIGNA" handbook informs employees that "the Company can terminate your employment at any time for any reason." By using that language, defendant carefully attempted to preserve plaintiff's at-will status, unencumbered by any implied promise. Put differently, we are persuaded that the company intended to be responsible only for those obligations that it affirmatively had accepted. Under that circumstance, defendant cannot now invoke *Woolley*'s holding to bind plaintiff in the manner sought here.

Absent *Woolley,* our analysis is governed by familiar contract principles. Unless required by the Statute of Frauds, *N.J.S.A.* 25:1-5 to -16, or as otherwise provided by law, contracts do not need to be in writing to be enforceable. When one party, however, presents a contract for signature to another party, the omission of that other party's signature is a significant factor in determining whether the two parties mutually have reached an agreement. *Cf.* 1 Richard A. Lord, *Williston on Contracts* § 2:3 (4th ed.1990) (noting that although party's signature on written contract "probably" is not required in absence of statute, "a signature is customary and desirable").

Without plaintiff's signature on the Agreement that accompanied the "You and CIGNA" handbook, we cannot enforce the arbitration provision unless we find some other explicit indication that the employee intended to abide by that provision. No such indication appears in the record. Plaintiff's intention is further clouded by defendant's August 17, 1998, e-mail that acknowledges that the company's "handling of the employee Handbook receipt and agreement process left a lot to be desired." That e-mail offered employees the option of retaining the acknowledgment form that they previously had signed (that made no mention of arbitration) or "request[ing] and sign[ing] the revised form." The e-mail also states on behalf of defendant, "we are removing the link between signing the Handbook receipt and future compensation and benefits actions."

Plaintiff argues that that language served to revoke an "offer" to arbitrate before he "could even accept [it]." Plaintiff's argument, standing alone, is not entirely persuasive. A portion of the e-mail not emphasized by plaintiff states that defendant believed that "everyone is

fully aware of company policy," suggesting that the company had not rescinded what it considered a valid agreement. That said, the e-mail transmission is open to interpretation such that doubts are raised concerning the agreement's validity. We are constrained to conclude that the record as a whole does not demonstrate that plaintiff had surrendered his statutory rights knowingly and voluntarily, which remains the critical inquiry.

Defendant contends that reinstating plaintiff's Law Division complaint would run afoul of the FAA. We disagree. We do no more than conclude that an arbitration provision cannot be enforced against an employee who does not sign or otherwise explicitly indicate his or her agreement to it. Consistent with basic contract law, that unremarkable conclusion in no way offends the FAA. The Court is free to consider whether a purported arbitration agreement contains those same elements that are required to uphold any other contract. Included in those requirements is the assent of the party against whom enforcement is sought, as customarily indicated by that party's signature.

Defendant's own documents contemplated plaintiff's signature as a concrete manifestation of his assent. As already noted, the Agreement that accompanied the "You and CIGNA" handbook includes a place for employees to sign. Moreover, the Agreement instructs that its terms cannot be changed, "except in writing signed by [the employee] and the president of the Company." The opening page of the handbook mirrors that requirement. Our contract law does not permit defendant to contemplate or require plaintiff's signature on an agreement and then successfully to assert that the omission of that signature is irrelevant to the agreement's validity. *Cf. Restatement*

(Second) of Contracts § 60 (1981) (instructing that offeree must comply with offeror's prescribed manner of acceptance to create contract).

Lastly, we agree with defendant that plaintiff knew of the company's arbitration policy based on its publication in numerous documents that he had received during his employment. The record, however, contains no one document or other piece of evidence that unmistakably reflects plaintiff's agreement to that policy. Plaintiff's status as an attorney does not alter our disposition provided that he truly had not intended to waive his rights under CEPA. See *Garfinkel, supra,* 168 *N.J.* at 136 (invalidating waiver provision irrespective of employee's status as physician).

In sum, *Woolley*'s implied-contract doctrine does not extend to a waiver-of-rights agreement. Although not strictly required, a party's signature to an agreement is the customary and perhaps surest indication of assent. Absent plaintiff's signature here, we cannot enforce the waiver provision unless we find some other unmistakable indication that the employee affirmatively had agreed to arbitrate his claims. Finding no such proof, we must hold for plaintiff.

IV.

In its thoughtful brief, defendant expresses concern over an employer's ability to effectuate arbitration agreements as its chosen method for resolving workplace disputes. Our holding is not to be construed as requiring employers to negotiate individual agreements with their entire workforce to implement a company-wide arbitration policy. The parties would have effectuated such a policy in this case had defendant only obtained plaintiff's signature

on the pre-printed Agreement that it attached to the "You and CIGNA" handbook or otherwise made available to its employees. Plaintiff has admitted that signing that form would have served as a clear manifestation of his intent to waive his right to a jury trial under CEPA.

Similarly, the acknowledgment form that plaintiff did sign would have sufficed as concrete proof of a waiver had it stated that the employee had agreed to the more detailed arbitration provision contained in the handbook. (The acknowledgment form states only that plaintiff had "received" the handbook, not that he had "agreed" to its terms.) We assume that even large employers presently require their employees to sign similar forms as a routine part of the handbook-distribution process. Thus, with minimal effort, employers can revise the language to include an indication that the recipient has received *and agreed* to an arbitration policy. The acknowledgment form need not recite that policy verbatim so long as the form refers specifically to arbitration in a manner indicating an employee's assent, and the policy is described more fully in an accompanying handbook or in another document known to the employee.

Our approach here is analogous to the one followed in *Mt. Hope Development Associates v. Mt. Hope Waterpower Project,* 154 *N.J.* 141 (1998). At issue in that case was the Alternative Procedure for Dispute Resolution Act, *N.J.S.A.* 2A:23A-1 to -19 (APDRA). That statute sets forth in detail the manner in which parties may resolve disputes without resorting to traditional civil litigation. *Mt. Hope, supra,* 154 *N.J.* at 145-46. The parties in *Mt. Hope* had entered into a consent judgment that referred without elaboration to the APDRA as providing the procedures under which they would settle any future claims between them. *Id.* at

144. We concluded that that reference was sufficient to bind the parties to all aspects of the APDRA, including its limitation on a party's right to judicial review. *Id.* at 146.

So, too, an employer and its employee may agree to arbitrate their disputes by referring generally to an arbitration policy contained in a separate writing, provided that the policy itself clearly reflects the employee's knowing and voluntary waiver of rights. The "You and CIGNA" handbook qualifies as such a writing. The problem in this case is that the acknowledgment form signed by plaintiff contains no statement that he had agreed to the arbitration provision. For the reasons already expressed, without some affirmative indication of plaintiff's assent, that provision cannot operate to deny plaintiff his rights under CEPA to which he otherwise is entitled.

V.

The judgment of the Appellate Division is affirmed.

CHIEF JUSTICE PORITZ and JUSTICES COLEMAN, LONG, LaVECCHIA, ZAZZALI and ALBIN join in JUSTICE VERNIERO'S opinion.

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT
OF NEW JERSEY
APPELLATE DIVISION

PAUL LEODORI,

Plaintiff-Appellant,

v.

CIGNA CORPORATION, CIGNA INSURANCE COMPANY, INSURANCE COMPANY OF NORTH AMERICA, WILSON TAYLOR, THOMAS WAGNER, GERALD ISOM, JAMES ENGEL, JOHN MURPHY, DAVID GOLD, BEVERLY SHERBONDY, STEPHANIE MIDDLETON, ANTHONY SMITH, ALFRED DECRANE, JAMES J. RITCHIE, AND ROBERT CAMPBELL,

Defendants-Respondents.

A-5369-99T3

(Filed Dec. 27, 2001)

PAUL LEODORI,

Plaintiff-Appellant,

v.

CIGNA CORPORATION, CIGNA INSURANCE COMPANY, INSURANCE COMPANY OF NORTH AMERICA, SCHNADER HARRISON SEGAL & LEWIS, LLP, ARLIN ADAMS, LISA DETWEILER,

A-1996-00T3

WILSON TAYLOR, THOMAS WAGNER, GERALD ISOM, JAMES ENGEL, JOHN MURPHY, DAVID GOLD, BEVERLY SHERBONDY, STEPHANIE MIDDLETON, ANTHONY SMITH, JAMES J. RITCHIE, ROBERT CAMPBELL, DENNIS KANE, ALFRED DECRANE, PETER LARSON, JOSEPH NEUBAUER, HAROLD WAGNER AND CAROL WAIT,

Defendants-Respondents.

Argued December 12, 2001 – Decided DEC 27 2001

Before Judges Conley, A. A. Rodriguez and Lisa.

On appeal from Superior Court of New Jersey, Law Division, Camden County, L-1147-00 and L-3776-00.

Paul Leodori argued the cause *pro se*.

Michael K. Furey argued the cause for respondents (Montgomery, McCracken, Walker & Rhoads, attorneys; Riker, Danzig, Scherer, Hyland & Perretti, attorneys; (Mr. Furey, Edward T. Ellis, Janice A. Greenberg and Brett Reina, on the brief).

PER CURIAM

These back-to-back appeals, consolidated for the purpose of a single opinion, arise from plaintiff's efforts to

litigate his CEPA[1] claims against his former employers. During the course of his employment, an Arbitration Policy and two employment handbooks were distributed to employees which included binding arbitration as a final dispute resolution procedure. Plaintiff's appeal in A-5369-99T3 arises from the dismissal of his CEPA complaint and referral of the dispute to binding arbitration on the basis of the arbitration provisions. His appeal in A-1996-00T3 arises from his unsuccessful efforts to pursue, as part of those provisions, what he claims to be the first step thereof set forth in the handbooks, and the dismissal of his second complaint seeking review of defendants' refusal to grant plaintiff the first-step review. In the appeals, plaintiff asserts a total of twenty-three points. In light of *Garfinkel v. Morristown Obstetrics Gynecology Assocs. (MOGA)*, 168 *N.J.* 124 (2001), and *Grasser v. United Healthcare Corp.*, 343 *N.J. Super.* 241 (App. Div. 2001), we are convinced defendants must establish a knowing and voluntary waiver by plaintiff of his right to a jury trial on his statutory CEPA claims, and cannot do so. For that reason, therefore, we reverse the dismissal of the first complaint and referral of the matter to binding arbitration. As a result, we need address only the contention in point III A of the brief filed in A-5369-99T3. However, for the sake of completeness, we have considered the various other issues raised therein and are convinced they are of insufficient merit to require further discussion. *R.* 2:11-3(e)(1)(E). As to A-1996-00T3, our disposition of A-5369-99T3 renders that appeal moot.

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[1] New Jersey Conscientious Employee Protection Act, *N.J.S.A.* 34:19-1 to -8.

We set forth only those facts relevant to the *Garfinkel / Grasser* waiver issue. Plaintiff was employed by Insurance Company of North America (INA) from June 1995 to December 1998 and by CIGNA from December 1998 to May 1999 when he was terminated. INA and CIGNA are "sister" companies. Plaintiff alleges in his complaint that prior to his termination, he accused his superiors of certain misconduct. When the superiors were cleared of any wrongful conduct by a neutral arbitrator, he was fired in retaliation.

At all times during his employment with INA and CIGNA plaintiff was on the INA Legal & Pubic Affairs (L&PA) payroll. In August 1994, L&PA adopted an Arbitration Policy, titled Employment Dispute Mediation/Arbitration Policy, which required arbitration as a final means for resolving employment disputes. In August 1996, a revised Arbitration Policy was sent by interoffice mail and U.S. mail to the offices and homes of all L&PA Division employees, including plaintiff. It contained a binding arbitration provision, as did the subsequent June 1998 L&PA 1998-1999 Human Resources Handbook. That handbook was distributed to all employees, including plaintiff. Finally, in July 1998, INA distributed another handbook captioned "You and CIGNA." It, too, contained a binding arbitration provision.

As to the scope of the arbitration procedures set forth in the 1996 policy and the 1998 handbooks, each contained the following:

> The Arbitration Policy was designed as a faster, less expensive substitute for going to court. Mutual promises by both the employee and the employer to arbitrate employment related legal claims is a term and condition of an employee's

employment and arbitration must be used rather than going to court to enforce legal rights and claims (or going to a government agency which in some states acts like a court in judging claims).

The agreement to arbitrate applies to serious employment-related disagreements and problems, which are those that concern a right, privilege, or interest recognized by applicable law. Such serious disputes include claims, demands, or actions under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1866, the Civil Rights Act of 1991, the Equal Pay Act, the Age Discrimination in Employment Act, the Employee Retirement Security Act of 1974, the Fair Labor Standards Act, the Rehabilitation Act of 1973, the Americans with Disabilities Act, the Family and Medical Leave Act, and any other federal, state, or local statute, regulation, or common law doctrine, regarding employment discrimination, conditions of employment, or termination of employment.

[Emphasis added.]

There are three employee acknowledgment forms in the record, two of which plaintiff signed. First, on June 15, 1998, plaintiff signed an Employee Handbook Acknowledgment to the L&PA 1998-1999 Human Resources Handbook. The Acknowledgment read as follows:

EMPLOYEE HANDBOOK ACKNOWLEDGMENT

I hereby acknowledge that I have received a copy of the 1998/99 Legal & Public Affairs handbook.

I understand this handbook includes information on division policies and programs and that I am responsible for knowing the policies and information. I further understand any of the policies and programs are subject to change at the discretion

> of senior management and that the handbook and its contents are not a contract of employment.

This signed acknowledgment does not specify what types of disputes the arbitration procedure covers.

Second, the last page of the "You and CIGNA" handbook contained an "Employee Handbook Receipt and Agreement," which stated in pertinent part:

> I understand that by accepting employment and being eligible to receive increases in compensation and benefits, I am agreeing to the following two important terms of my employment described in You and CIGNA [handbook]: (1) my employment can be terminated by me or my employer at any time for any reason – therefore, my employment is at the will of either party, and (2) *I will use the Company's internal and external employment dispute resolution processes to resolve legal claims against the Company – therefore rather than go to court or to a government agency for a hearing to decide my legal claim, I will submit my employment related legal claims except workers' compensation and unemployment compensation to* final and binding neutral third party arbitration. I understand further that these two terms of my employment replace and supersede any prior agreement concerning these terms and cannot be changed except in writing signed by me and the president of the Company.
>
> [Emphasis added.]

There is no evidence that plaintiff signed this acknowledgment. We need not, therefore, determine whether the language is sufficient to constitute a waiver of statutory claims.

Third, shortly after distribution of the "You and Cigna" handbook, in September 1998, a new "Employee Handbook Receipt" was distributed and all employees, including plaintiff, were directed to sign it. The new acknowledgment read as follows:

> EMPLOYEE HANDBOOK RECEIPT
>
> TO BE PLACED IN EMPLOYEE'S PERSONNEL FILE PAYROLL & PERSONNEL RECORDS DEPARTMENT
>
> This is to acknowledge that I have received my copy of the July 1998 employee handbook, You and CIGNA. I have reviewed the material which includes information on policies, programs and services for employees of the CIGNA companies.

There is no mention in this acknowledgment of the type of disputes the signing employee was acknowledging, or an acknowledgment that statutory tort claims were being waived.

Moreover, as to the two "You and CIGNA" acknowledgment forms and the replacement of the first by the second form, plaintiff had this to say:

> Page 77 of the You and CIGNA handbook contained an offer to arbitrate employment-related disputes. . . .
>
> Shortly after the distribution of the You and CIGNA handbook, INA revoked its offer to enter into an arbitration agreement with its employees. This revocation was accomplished through a series of e-mails and/or hard copy memos sent by INA personnel.
>
> Immediately after INA revoked it[s] arbitration offer, it distributed, in or about September 1998,

> a new "Employee Handbook Receipt." All INA employees were directed to sign this receipt. . . .
>
> I was unclear as to why INA retracted its July 1998 offer to arbitrate employment-related disputes. However, it was clear to me when I signed the second receipt that an offer to arbitrate employment claims was not being extended to me.

Defendants disputed the contention that the "arbitration offer" had been revoked and that the second acknowledgment form was the product of that. They submitted, in that respect, an August 17, 1998 memorandum to all CIGNA employees which explained in part:

> Our recent handling of the employee Handbook receipt and agreement process left a lot to be desired. Virtually all aspects of the communications and distribution process that could have gone wrong did – moreover, the process was too complicated and legalistic and I apologize. Our goal was – and is – to ensure that everyone who works for CIGNA have a clear understanding and commitment to ensuring the successful implementation of the existing policies and programs we have designed to create a respectful and productive work environment in our company. We wanted to be sure that everyone read the Handbook rather than tossing it in the bottom drawer as some may have done in the past.
>
> Although similar communications describing our employee policies and programs have been distributed broadly over the last several years, we and other companies have experienced situations where some employees have claimed they were unaware of the rules associated with company employment and business policies. Permitting some employees to argue that they do not have to

> abide by the same rules as others because they didn't read available materials – or at least said they didn't – is not fair to other employees or to the company.
>
> Upon reflection, and based upon your feedback, we are removing the link between signing the Handbook receipt and future compensation and benefits actions. We now believe that the recent high level of visibility and dialogue around the Handbook more than meets the test of ensuring that everyone is fully aware of company policy and eliminates the need for potential penalties.

This memorandum does no more than admit that employees in the past had not understood what was contained in the handbooks and policies and that CIGNA was no longer requiring "link between signing the Handbook receipt and future compensation and benefits actions," relying, rather, upon "recent high level of visibility and dialogue around the Handbook."

As we have said at the outset, disposition of this appeal is governed by *Garfinkel v. MOGA, supra*, 168 *N.J.* 124, and *Grasser v. United Healthcare Corp., supra*, 343 *N.J. Super.* 241. In *Garfinkel*, plaintiff was a licensed physician associated with an obstetrics and gynecological practice. In his LAD and common law litigation against the practice, he claimed he was unlawfully discharged based upon his gender. In part, the employment agreement he signed at the time he commenced his association with the practice stated that: "any controversy or claim arising out of, or relating to, this Agreement or the breach thereof, shall be settled by arbitration. . . . " *Id.* at 128. Both the trial judge and we concluded that this language

required plaintiff to pursue his claims by way of binding arbitration.

The critical question, of course, was whether plaintiff had knowingly and voluntarily waived his statutory LAD claims. The Supreme Court disagreed with our conclusion that he had. In doing so, the Court recognized, as a general rule, the principle that parties to an employment agreement may waive statutory remedies in favor of arbitration. *Id.* at 131. But, although arbitration is afforded favored status and agreements to arbitrate should be read liberally in favor of arbitration, it will not be assumed that employees intended to waive statutory rights unless the arbitration provision, which is accepted by the employee, makes that clear. *Id.* at 132, 135. Thus, the Court cautioned that while it did "not suggest that [an employer] need refer specifically to the LAD or list every imaginable statute by name to effectuate a knowing and voluntary waiver of rights," *id.* at 135:

> To pass muster . . . a waiver-of-rights provision should at least provide that the employee *agrees to arbitrate all statutory claims arising out of the employment relationship or its termination. It should also reflect the employee's general understanding of the type of claims included in the waiver, e.g., workplace discrimination claims.*
>
> [*Ibid.*][2]

---

[2] The Court did not mandate any particular language. However, it did state:

> Along those lines, the court in [*Alamo Rent A Car v. Garlarza*, 306 *N.J. Super.* 384 (App. Div. 1997)] aptly observed:

The Court reversed the dismissal of Garfinkel's LAD claims in his Superior Court complaint because what he signed stated only that "any controversy or claim arising out of, or relating to, this [employment] Agreement or the breach thereof" was subject to binding arbitration. The language of this acknowledgment or waiver did not include specific reference to statutory claims relating to the employment relationship or its termination or, more specifically, to statutory work place discrimination claims and the like. In this respect, the Court observed:

> The clause states that "any controversy or claim" that arises from the agreement or its breach shall be settled by arbitration. That language suggests that the parties intended to arbitrate only those disputes involving a contract term, a condition of employment, or some other element of the contract itself. Moreover, the language does not mention, either expressly or by general reference, statutory claims redressable by the LAD.
>
> [*Id.* at 134.]

> The better course would be the use of language reflecting that the employee, in fact, knows that other options such as federal and state administrative remedies and judicial remedies exist; that the employee also knows by signing the contract, those remedies are forever precluded; and that, regardless of the nature of the employee's complaint, he or she knows that it can only be resolved by arbitration. (*Alamo, supra*, 306 *N.J. Super.* at 394).
>
> [*Ibid.*]

See Quigley v. KPMG Peat Marwick, LLP, 330 *N.J. Super.* 252, 270-73 (App. Div.), *certif. denied*, 165 *N.J.* 527 (2000); *Alamo Rent A Car, Inc. v. Galarza*, 306 *N.J. Super.* 384, 394-95 (App. Div. 1997).

We note, too, that the Court in *Garfinkel* was unpersuaded by defendant's contention that a different standard should pertain because the plaintiff was "a medical professional who negotiated the complex agreement and a supplement thereto with the assistance of counsel." 168 *N.J.* at 135. ("Irrespective of plaintiff's status or the quality of his counsel, the Court must be convinced that he actually intended to waive his statutory rights." *Id.* at 136).

We reiterated the essence of *Garfinkel* in *Grasser v. United Healthcare Corp.*, *supra*, 343 *N.J. Super.* at 247, when we said, "both this court and the New Jersey Supreme Court have been ... clear in insisting that any [waiver of statutory claims] and agreement to arbitrate must be explicit and must refer specifically to arbitration of termination disputes and claims of [statutory] violations. Our courts will not indulge an assumption that an employee would probably know, or should know, that vague or non-specific language is intended to include termination disputes and/or [statutory] violations. Waiver provisions which are not clear and explicit will not be enforced." *Ibid.* In *Grasser*, plaintiff was terminated, ostensibly for a violation of defendant's policy on sexual harassment. He brought a suit alleging violations of LAD, as well as a number of common law claims relating to his discharge. Defendant moved to dismiss the complaint based upon its claim that plaintiff had knowingly and voluntarily waived his statutory claims by acknowledging

an employee handbook which contained a binding arbitration provision. The trial judge concluded there were material issues of disputed facts concerning plaintiff's alleged knowing and voluntary waiver.

In affirming, we noted that the language of the employer's handbook was adequate to waive statutory claims. *Id.* at 251. In this respect, the handbook stated that arbitration was the final and exclusive forum for resolution of

> all employment related disputes which are based on a legal claim. . . .
>
> A dispute is based on a legal claim and is subject to this Policy if it arises or involves a claim under any federal, state, or local statute, regulation or common law doctrine regarding or related to employment discrimination, terms and conditions of employment, or termination of employment including, but not limited to, the following: Title VII of the Civil Rights act of 1964 [sic], the Civil Rights Act of 1866, the Civil Rights Act of 1991, the Age Discrimination in Employment Act, the Rehabilitation Act of 1973, the Americans with Disabilities Act, the Employee Retirement Income Security Act of 1974, and all applicable amendments; state human rights or fair employment practices laws; breach of contract; promissory estoppel, or any other contract theory; and defamation, employment negligence, or any other tort theory.
>
> [*Id.* at 244-46.]

But while this language sufficed to waive statutory claims, whether plaintiff knowingly and voluntarily acknowledged

such waiver was not clear. The only document that plaintiff signed acknowledging the waiver referred to arbitration of "employment concerns," and "employment related disputes which are based on a legal claim." *Id.* at 250. As we pointed out, that acknowledgment "does not mention arbitration of LAD claims or arbitration under comparable federal anti-discrimination laws. It does not even refer specifically to claims of unlawful termination, nor does it conform with the *Garfinkel* requirement that such a wavier 'should at least provide that the employee agrees to arbitrate all statutory claims arising out of the employment relationship or its termination.'" *Id.* at 250-51 (quoting *Garfinkel*, *supra*, 168 *N.J.* at 135). We rejected the contention that a knowing and voluntary waiver, nonetheless, existed because the handbook language was sufficient. We said:

> Nor is the problem cured by a generalized reference to the Employee Handbook. While the Handbook language itself, if employed in a document signed by the employee, would seem sufficiently broad, clear and specific to cover plaintiff's complaint, that language was not in the document signed by plaintiff. Thus, so far as appears, the operative language was not in front of plaintiff when he signed a document which, according to defendant, had the effect of "depriving [him] . . . of access to the courts" and waived his "time-honored right to sue" *See* [*Garfinkel*, *supra*, 168 *N.J.* at 132]. It is not sufficient to claim, as defendant seems to claim, that by referring back to the Employee Handbook, plaintiff could have given more specific content to the vague language that he accepted when he signed the Acknowledgment. It is not enough to say that he could have, or should have, understood the

import of language which was not clear on its face.

[*Grasser, supra*, 343 *N.J. Super.* at 251.]

Thus, *Garfinkel* and *Grasser* together require that an effective waiver of a jury trial on statutory legal claims through imposition of binding employment arbitration provisions must make clear that those rights are subject to the arbitration forum in lieu of a judicial proceeding. Further, the employer must demonstrate a knowing acknowledgment of that by the employee. "[O]ne seeking to enforce such a provision must show that the plaintiff 'actually intended' such a waiver and that the writing he signed was 'unambiguous' in spelling out such a waiver." *Grasser v. United Healthcare Corp., supra*, 343 *N.J. Super.* at 252.

Here, there are several documents defendants contend set forth the waiver and plaintiff's knowing and voluntary acknowledgment. At the outset, we concede that the language used in the August 1996 policy and the two 1998 handbooks as to what would be encompassed in the arbitration procedures is sufficiently broad to satisfy *Garfinkel*. The focus here is upon whether defendants demonstrated that plaintiff "actually intended" to waive his statutory claims. We first point out that in support of its motion, defendants point to the handbooks. But as we have said in *Grasser*, that is insufficient. Indeed, those cases in which we have held a waiver has been demonstrated involved employee signed documents. *See Gras v. Associated First Capital Corp.*, ___ *N.J. Super.* ___ (App. Div. 2001 (slip op. at 4, 19); *Alamo Rent A Car v. Garlarza* [sic], *supra*, 306 *N.J. Super.* at 386; *Young v. Prudential Ins. Co. of Am.*, 297 *N.J. Super.* 605, 613 (App. Div.), *certif.*

denied, 149 *N.J.* 408 (1997); *Singer v. Commodities Corp.*, 292 *N.J. Super.* 391, 400 (App. Div. 1996).

Plaintiff signed two documents here. One on June 15, 1998, in connection with the L&PA Human Resources Handbook and one in September 1998 in connection with the "You and CIGNA" handbook. The language of neither is expressive of an "actual intent" to waive statutory claims. In fact, the language is not much different from the acknowledgment in *Grasser* which we found deficient. *See Grassser*, *supra*, 343 *N.J. Super.* at 250. We reiterate what we said in *Grasser*:

> Certainly a waiver such as that which defendant asserts here is substantial. According to defendant, plaintiff has knowingly and understandably surrendered a right to submit his claim of discriminatory discharge to a court and a jury. To effect that drastic result, particularly since defendant drafted the language in question and presented it to plaintiff as a requirement for his continued employment, we see no reason why defendant should not be required to employ, in the Acknowledgment signed by its employees, language that is simple, specific, unambiguous and clear to anyone of normal intelligence and perception who is asked or required to sign it.
>
> [*Id.* at 252.]

Although defendants contend plaintiff demonstrated that he "actually intended" to waive his statutory claims by referring to the dispute resolution procedures in his complaint and asserting certain rights thereunder, that can hardly be considered a knowing waiver made at the time of his employment. Moreover, we can understand defendants' insistence that plaintiff, as an attorney, knew

what he was acknowledging when he signed the two acknowledgments, as he is an attorney. But while there might be some factual issue as to plaintiff's knowledge of the arbitration policies that could have arisen had discovery occurred, the complaint was dismissed almost at the outset and based solely upon the handbooks and acknowledgments. We do not think their insufficiency *per se* as establishing the necessary knowing waiver should be evaluated differently because of plaintiff's level of sophistication. *Cf. Garfinkel, supra*, 168 *N.J.* 135-36.

Reversed.

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PAUL LEODORI, Plaintiff, v. CIGNA Corporation, CIGNA INSURANCE COMPANY, INSURANCE COMPANY OF NORTH AMERICA, WILSON TAYLOR, THOMAS WAGNER, GERALD ISOM, JAMES ENGEL, JOHN MURPHY, DAVID GOLD, BEVERLY SHERBONDY, STEPHANIE MIDDLETON, ANTHONY SMITH, ALFRED DECRANE, JAMES J. RITCHIE, ROBERT CAMPBELL, JOHN DOES 1-5, and ABC CORPORATIONS 1-5, said individuals and corporations being fictitious, Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION CAMDEN COUNTY DOCKET NO: L-1147-00 CIVIL ACTION **ORDER TO DISMISS**

THIS MATTER having come before the Court on the Motion of Riker, Danzig, Scherer, Hyland & Perretti LLP and Montgomery, McCracken, Walker & Rhoads, LLP, attorneys for Defendants for an Order granting Defendants' motion to compel Arbitration; and

The Court having considered the papers submitted and the oral arguments of counsel; and

The Court finding that there is a valid and binding agreement between the Plaintiff and the Defendant companies that requires the Plaintiff to present his claims, including all claims against the defendants, to arbitration in accordance with the Defendant companies' arbitration policies, rules and procedures; it is hereby

ORDERED that this matter is DISMISSED without prejudice.

ORDERED that a copy of this Order shall be served on all parties within 10 days of the date of this Order.

/s/ M. Allan Vogelson
M. Allan Vogelson, J.S.C.
5/8/00

ORDER PREPARED BY THE COURT

PAUL LEODORI, Plaintiff, vs. CIGNA CORPORATION, CIGNA INSURANCE COMPANY, INSURANCE COMPANY OF NORTH AMERICA, ET AL, Defendants.	:	SUPERIOR COURT OF NEW JERSEY LAW DIVISION CAMDEN COUNTY Docket No. L-3776-00 Civil Action ORDER ORDER DISMISSING COMPLAINT (without prejudice)

This matter being opened to the Court on its own motion, and the Court having good cause to dismiss;

It is on this 1st day of August, 2000, ORDERED the above captioned matter is dismissed without prejudice.

/s/ M. Allan Vogelson
M. Allan Vogelson, P.J.S.C.

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Plaintiff, Pro Se

PAUL LEODORI, Plaintiff, v. CIGNA CORPORATION, et al., Defendants.	:	SUPERIOR COURT OF NEW JERSEY LAW DIVISION, CAMDEN COUNTY DOCKET NO.:L-3776-00 ORDER

THIS MATTER being opened to the court by Plaintiff, Pro Se, on his Motion For Reconsideration to reinstate the Complaint in this matter; and the court having considered the papers submitted, and having heard the arguments of counsel, and for good cause being shown:

IT IS on this 26 day of ~~September~~ October, 2000 hereby ORDERED that Plaintiff's Complaint herein is reinstated nunc pro tunc; it is

FURTHER ORDERED that Plaintiff shall serve this Order on all Defendants by regular mail on or before October 1, 2000; it is

FURTHER ORDERED that all Defendants shall file an answer to Plaintiff's Complaint on or before November 1, 2000; and it is

FURTHER ORDERED that this Order shall supersede any previous Order entered on this Docket Number.

DENIED

Hon. M. Allan Vogelson, P. J.S.C.

Supreme Court, U.S.
FILED
JUN 13 2003

No. 02-1680

In The

Supreme Court of the United States

CIGNA CORPORATION, et al.,

Petitioners,

v.

PAUL LEODORI,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of New Jersey

BRIEF OF THE RESPONDENT IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

PAUL A. LEODORI
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Respondent, Pro Se

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Federal Arbitration Act, 9 U.S.C. § 1-16 (2000) ..... *passim*

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STATEMENT OF THE CASE

The Federal Arbitration Act, 9 U.S.C. § 1-16 (2000) ("FAA") does not apply to this case because the New Jersey Supreme Court held there was no arbitration agreement, written or otherwise, between any Petitioner and Respondent. Petitioner Insurance Company of North America ("INA") merely offered a written agreement to arbitrate that required acceptance by Respondent signing same. However, INA's offer was revoked via e-mail prior to any acceptance and the revoked agreement to arbitrate was never even signed by Respondent.

The record further establishes that there could be no consideration for such an arbitration agreement with Respondent because INA expressly admitted to "removing the link between signing the Handbook receipt and future compensation and benefits actions." Pet., App. at 8a. Since all of Petitioners' arguments are erroneously based upon a fictional arbitration agreement not supported by the record, they all must fail.

THIS COURT LACKS JURISDICTION TO GRANT A WRIT OF CERTIORARI

The "preeminent concern" behind the FAA was to "enforce private [arbitration] agreements into which parties had entered." *Perry v. Thomas*, 482 U.S. 483, 490 (1987). Since the New Jersey Supreme Court found no agreement to arbitrate, the FAA is not applicable and this Court lacks jurisdiction to grant a writ of certiorari pursuant to 28 U.S.C. § 1257(a) (1993).

THE UNIQUE FACTS FURTHER JUSTIFY DENIAL OF PETITIONERS' PETITION

While an employee of Petitioner INA, Respondent was presented in July, 1998 with an employee handbook called "You and CIGNA" which included at page 77 the following proposed agreement. Pet., App. at 6a-7a.

EMPLOYEE HANDBOOK RECEIPT AND AGREEMENT

This is to acknowledge that I have received my copy of the July 1998 employee handbook, You and CIGNA. I understand that by accepting employment and being eligible to receive increases in compensation and benefits, I am agreeing to the following two important terms of my employment described in You and CIGNA: (1) my employment can be terminated by me or my employer at any time for any reason – therefore, my employment is at the will of either party, and (2) I will use the Company's internal and external employment dispute resolution processes to resolve legal claims against the Company – therefore rather than go to court or to a government agency for a hearing to decide my legal claim, I will submit my employment related legal claims except workers' compensation and unemployment compensation to final and binding neutral third party arbitration. I understand further that these two terms of my employment replace and supersede any prior agreement concerning these terms and cannot be changed except in writing signed by me and the president of the Company.

(*The term "the Company" means the particular CIGNA subsidiary or company that employs you.)

Pet., App. at 7a-8a. This proposed agreement required Respondent's signature for acceptance to be effective. Pet., App. at 7a. Respondent never signed this **EMPLOYEE HANDBOOK RECEIPT AND AGREEMENT**. Pet., App. at 18a.

Moreover, the offer of Petitioner INA to arbitrate with Respondent was withdrawn by e-mail on August 17, 1998. Pet., App. at 8a-9a.

> Our recent handling of the **employee Handbook receipt and agreement** process left a lot to be desired. Virtually all aspects of the communications and distribution process that could have gone wrong did – moreover, the process was too complicated and legalistic, and I apologize . . .
>
> Upon reflection, and based upon your feedback, we are removing the link between signing the Handbook receipt and future compensation and benefits . . .
>
> We are proud of the many programs and benefits that are available to all CIGNA employees. And we want everyone in the company to understand that you have your legal rights and more options for resolving employee grievances fairly, quickly and inexpensively than employees in most other companies . . .

Pet., App. at 8a-9a. (emphasis added)

Thereafter, Respondent became an employee of Petitioner, CIGNA Insurance Company, and was never presented with an employment contract or offer to arbitrate while an employee of CIGNA Insurance Company. Pet., App. at 3a. When Respondent's employment with CIGNA Insurance Company was terminated on May 14,

1999, all Petitioners sought to impose arbitration after Respondent asserted various claims against them.

The New Jersey Supreme Court held that INA's withdrawal of the proposed arbitration agreement prior to execution and acceptance by Respondent was fatal to Petitioners' claim that Respondent "knowingly and voluntarily" agreed to arbitration. Pet., App. at 17a.

> Without plaintiff's signature on the **[Employee Handbook Receipt and] Agreement** that accompanied the "You and CIGNA" handbook, we cannot enforce the arbitration provision unless we find some other explicit indication that the employee intended to abide by that provision. No such indication appears in the record.

Pet., App. at 16a. (emphasis added) In so holding, the Court stated:

> Our contract law does not permit [Petitioners] to contemplate or require [Respondent's] signature on an agreement and then successfully to assert that the omission of that signature is irrelevant to the agreement's validity. *Cf. Restatement (Second) of Contracts* 60 (1981) (instructing that offeree must comply with offeror's prescribed manner of acceptance to create contract).

Pet., App. at 18a.

> Absent plaintiff's signature here, we cannot enforce the waiver provisions unless we find some other unmistakable indication that the employee affirmatively had agreed to arbitrate his claims. Finding no such proof, we must hold for plaintiff.

Pet., App. at 18a. Finding no agreement to arbitrate, the New Jersey Supreme Court held the FAA to be inapplicable. Pet., App. at 17a.

In so holding, the Court specifically emphasized the uncontroverted lack of consideration between Petitioners and Respondent necessary to form the basis for an arbitration agreement.

> The e-mail [sent to Respondent] also states on behalf of [Petitioners], "we are removing the link between signing the Handbook receipt and future compensation and benefits actions."

Pet., App. at 16a. This finding by the New Jersey Supreme Court of no consideration further establishes that no contractual agreement to arbitrate did exist or even could have existed between Petitioners and Respondent.

A WRIT SHOULD BE DENIED BECAUSE THE DECISION BELOW ABIDES WITH THE FAA AND WITH DECISIONS OF THIS COURT

Absent "an agreement in writing to submit to arbitration" the FAA is not applicable. 9 U.S.C. § 2; 9 U.S.C. § 3. The New Jersey Supreme Court did not "run afoul of the FAA." Pet., App. at 17a. There is nothing unusual about the New Jersey Supreme Court, or any other court, holding that if an offeror's prescribed manner of accepting a contract is to sign an agreement, there is no agreement if the contract is not signed. Pet., App. at 18a.

A WRIT MUST BE DENIED BECAUSE NO CONTROVERSY EXISTS IN THE COURTS OVER ARBITRATION AGREEMENTS

This Court has spoken often and clearly about the FAA. Petitioners point out in their brief the many decisions which enforce written arbitration agreements. However, all of them are inapplicable in this case given the undisputed absence of an arbitration agreement.

In those cases cited by Petitioners, written agreements to arbitrate were actually accepted by being signed by the parties involved. Challenges to the arbitration provisions in these written arbitration agreements were ultimately unsuccessful because technical, procedural and non-substantive defects were insufficient to overcome the express written agreement to arbitrate mutually entered into by the parties. *Doctor's Associates Inc. v. Casarotto*, 517 U.S. 681, 116 S.Ct. 1652 (1996) (Arbitration agreement initially found technically invalid because Montana statute required that a contract containing arbitration clauses so indicate same in underlined capital letters on the first page); *David L. Threlkeld & Co. v. Metallgesellschaft Ltd.*, 923 F.2d 245 (2d Cir.), *cert. denied*, 501 U.S. 1267, 112 S.Ct. 17 (1991) (Parties did not dispute existence of arbitration agreements and challenges to same were based upon it being a contract of adhesion and contrary to Vermont statute were rejected because "the policy in favor of arbitration is even stronger in the context of international business transactions"); *Allied-Bruce Terminex Cos. v. Dobson*, 513 U.S. 265, 115 S.Ct. 834 (1995) (Party unsuccessfully challenged admitted arbitration agreement on grounds that Alabama statute invalidated predispute arbitration agreements).

Deficiencies inconsistent with the FAA are not why the New Jersey Supreme Court rejected Petitioners' request to arbitrate Respondent's claims. The undisputed absence of an arbitration agreement, not formalistic disqualifiers, are what distinguish this case from those enforcing written and executed arbitration agreements.

A WRIT SHOULD BE DENIED SINCE HOLDINGS BY NEW JERSEY COURTS ABIDE BY THE FAA

Without citing a single case by any New Jersey court, Petitioners argue that "New Jersey" courts have a "jaundiced view of arbitration in the employment context." Incredibly, the support for Petitioner's contention lies exclusively in a footnote about pending legislation.

The reality is that the New Jersey courts have historically and repeatedly enforced arbitration agreements in accordance with the FAA. *Young v. Prudential Ins. Co. of America*, 688 A.2d 1069 (App. Div.), *certif. denied*, 694 A.2d 193 (1997); *Singer v. Commodities Corp (U.S.A.)*, 678 A.2d 1165 (App. Div. 1996). Most recently, in *Martindale v. Sandvik, Inc.*, 800 A.2d 872 (2002) the New Jersey Supreme Court upheld an arbitration agreement.

CONCLUSION

For the foregoing reasons, this Court should deny Petitioners' petition for a writ of certiorari.

Respectfully submitted,

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(4)

Supreme Court, U.S.
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No. 02-1680

In The Supreme Court of the United States

CIGNA CORPORATION, *et al.*,

Petitioners,

v.

PAUL LEODORI,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of New Jersey

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REPLY BRIEF FOR PETITIONERS

The New Jersey Supreme Court held in this case that an agreement to arbitrate claims arising out of an employment dispute "cannot be enforced against an employee who does not *sign* or otherwise *explicitly indicate* his or her agreement to it." Pet. App. 17a (emphasis added). Respondent does not seriously contend this special condition on the enforcement of employment arbitration agreements – requiring signature or other form of "explicit" or "unmistakabl[e]" assent, *id.* at 16a – applies generally to the enforcement of contracts under New Jersey law. Accordingly, respondent cannot persuasively deny that the decision below conflicts with the repeated precedents of this Court and others holding that state statutes and judicial decisions may not impose conditions on the enforcement of arbitration agreements that are not also imposed on ordinary, non-arbitration contracts under state law. *See* Pet. 13-24.

Nor does respondent even attempt to dispute the importance of the issue presented here to the many employers who do business in states like New Jersey and California, where courts have imposed special conditions on the enforcement of employment arbitration agreements. As the petition explains (Pet. 26-27), and as the *amicus curiae* brief of the Equal Employment Advisory Council reinforces (EEAC Br. 14-15), decisions like the one below create significant uncertainty and disuniformity in the application and enforceability of the arbitration policies of many multi-state employers, "in the process undermining the FAA's proarbitration purposes and breeding litigation from a statute that seeks to avoid it." *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 123 (2001) (internal quotation marks omitted).

In short, this case easily satisfies every accepted criteria for *certiorari*: the decision below clearly conflicts with numerous decisions of this Court, and deepens a conflict among several federal circuits and state courts of last resort, on an increasingly recurring issue of tremendous importance to the Nation's employers and employees alike. On that basis there is every reason for the Court to grant *certiorari*.

Respondent's brief in opposition does nothing to suggest otherwise. Respondent's brief offers essentially three reasons *certiorari* should be denied. Each is meritless.

I. THIS COURT HAS JURISDICTION TO REVIEW THE DECISIONS OF LOWER COURTS INVALIDATING ARBITRATION AGREEMENTS ON GROUNDS THAT VIOLATE THE FAA AND THIS COURT'S DECISIONS

Respondent's main contention is that the New Jersey Supreme Court actually held in this case that no agreement to arbitrate exists at all. BIO at 1. From this, respondent attempts to draw the conclusions that this Court lacks jurisdiction, *id.*, and that the decision below does not conflict with other decisions, each of which, respondent says, involved actual arbitration agreements, *id.* at 6.

But of course respondent's contention that "the New Jersey Supreme Court found no agreement to arbitrate," *id.* at 1, is merely a restatement of the New Jersey Supreme Court's conclusion that the arbitration agreement is *not legally enforceable*, because of the unique condition that court imposed on employment arbitration agreements. The FAA obviously "encompasses laws affecting the

formation of arbitration agreements," *Saturn Distribution Corp. v. Williams*, 905 F.2d 719, 724 (4th Cir. 1990), including, for example, a law purporting to hold that agreements are not legally formed absent a clear notice provision, *see Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 682, 688 (1996). This Court thus has jurisdiction to review the New Jersey Supreme Court's compliance with the FAA's mandate that state courts recognize and enforce arbitration agreements on the "same footing" as other contracts. *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 271 (1995).

Contrary to respondent's submission, BIO at 6, this case is indistinguishable from key precedents of this Court and others applying that mandate. *Doctor's Assocs.*, for example, did not involve a "technical, procedural and non-substantive defect" in the arbitration agreement, BIO at 6, but a law that (impermissibly) tried to impose a special notice condition on the formation of an enforceable arbitration agreement. Likewise, this case involves a law that (impermissibly) tries to impose a special signature/explicit assent condition on the formation of an enforceable employment arbitration agreement. This case is also indistinguishable from *Progressive Cas. Ins. Co. v. C.A. Reaseguradora Nacional De Venezuela*, 991 F.2d 42, 46 (2d Cir. 1993), in which the Second Circuit held that a state-law requirement of "an express, unequivocal agreement" to arbitrate – precisely the same requirement imposed by the New Jersey Supreme Court in this case – was preempted by the FAA because no such enforceability requirement was imposed generally on other contracts under state law. The result in *Progressive Casualty* is utterly irreconcilable with the result below. Respondent neither discusses nor

even cites *Progressive Casualty*, but ignoring the conflict does not make it go away.[1]

II. THE UNMISTAKABLE ASSENT RULE IS NOT LIMITED TO THE FACTS OF THIS CASE BUT A RULE OF GENERAL APPLICATION FOR EMPLOYMENT ARBITRATION AGREEMENTS

Unable to refute the existence of a live and intolerable conflict in authority on the issue presented, respondent tries to suggest that this particular case is not an ideal vehicle for addressing the issue because of the supposedly "unique facts" of this case. BIO at 2. Respondent is wrong. The decision below cleanly and clearly presents the question whether a state may permissibly impose on employment arbitration agreements a condition that the employee sign or otherwise give explicit, unmistakable assent to the agreement, when no such condition is imposed under "ordinary state-law principles that govern the formation of

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[1] Respondent's suggestion that *certiorari* should be denied because "New Jersey courts have historically and repeatedly enforced arbitration agreements in accordance with the FAA," BIO at 7, is quite off base. In the only New Jersey Supreme Court case cited by respondent, the arbitration agreement had been signed by the party resisting enforcement and thus would have been enforced even under the special "unmistakable assent" rule adopted here. *See Martindale v. Sandvik, Inc.*, 800 A.2d 872, 875 (N.J. 2002). Thus, *Martindale* does nothing to undermine the basis for review of the decision below. Similarly, the plaintiffs had signed documents that included arbitration provisions in the two other cases cited by plaintiff. *Young v. Prudential Ins. Co. of America, Inc.*, 688 A.2d 1069, 1074 (N.J. Super. Ct. App. Div.), *cert. denied*, 694 A.2d 193 (N.J. 1997); *Singer v. Commodities Corp. (U.S.A.)*, 678 A.2d 1165, 1167 (N.J. Super. Ct. App. Div. 1996). In any event, this petition does not require this Court to determine the historical attitude of New Jersey courts towards employment arbitration agreements.

contracts." *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995).

That straightforward legal issue is presented on a factual record that is clean and undisputed for all purposes relevant to this Court's disposition of the case. The parties and the court below all agree that respondent received the two handbooks involved. Pet. App. 4a-6a. The parties and the court below all agree that each handbook states unambiguously that the agreement to arbitrate employment claims is a term and condition of continued employment. *Id.* Petitioners and the court below agree respondent knew of the arbitration policy. *Id.* at 18a. The parties and the court below all agree that respondent signed forms acknowledging that he had received each handbook and reviewed the policies discussed therein. *Id.* And the parties and the court below all agree that respondent did *not* sign an additional handbook receipt that included an express acknowledgment of and agreement to petitioners' arbitration policy. *Id.* at 7a.

It is thus undisputed that the arbitration agreement was "written," as the FAA requires, but not *signed*, as the decision below effectively requires. The simple legal question is whether such a signature (or equivalent explicit assent, if that is possible absent a signed document) requirement may be imposed uniquely on employment arbitration agreements consistent with the FAA. Or stated differently, may a state court require employers to obtain the unmistakable assent of employees to arbitrate when *contracting parties in other contexts are not required to make such special efforts in order to form enforceable contracts*?

Respondent nevertheless suggests that this case is "unique" because petitioners initially required employees to sign a receipt, which included the explicit acknowledgment of and agreement to the arbitration policy, and later rescinded this requirement. In addition to being incomplete and misleading, respondent's description of the events surrounding the two forms of receipt is irrelevant to the issue posed by this petition.[2] The unmistakable assent rule was not based upon the facts of this case, but a rule the New Jersey Supreme Court fashioned for all employment arbitration agreements. Pet. App. 20a. Only by applying its special unmistakable assent rule (despite the employee's knowledge of the policy and acceptance of continued employment, "no one document or other piece of evidence . . . unmistakably reflects plaintiff's agreement to that policy"), was the court able to declare the contract unenforceable. Thus, the opinion squarely raises the question whether such a special rule may be adopted and applied to deny enforcement of an arbitration agreement consistent with the FAA.

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[2] Respondent's claim that petitioners had withdrawn its offer to arbitrate by submitting a second form of receipt without explicit reference to arbitration was rejected by the lower court and contradicted by the documents. Pet. App. 16a-17a. Respondent relies primarily upon the e-mail explaining the need for the second form of receipt but (by using an ellipse in his quotation) fails to acknowledge a critical statement in the e-mail: "We now believe that the recent high level of visibility and dialogue around the Handbook more than meets the test of ensuring that *everyone is aware of company policy* and eliminates the need for potential penalties," *Id.* at 8a-9a (emphasis added). Thus, reference to arbitration in the receipt (signed by respondent) was unnecessary to ensure that employees were aware of the arbitration policy. *See also* Pet. 6-7.

Certainly neither the opinion nor respondent cites a single New Jersey precedent involving "ordinary state-law principles that govern the formation of contracts," *First Options*, 514 U.S. at 944, that holds an ordinary, non-arbitration agreement to be unenforceable under similar circumstances. In fact, as the petition demonstrates, New Jersey courts routinely hold employers and employees bound to other employment policies, even absent a signature, when the employee accepts an offer of (continued) employment with full knowledge of the policy. Pet. 16-18. Respondent does not disagree. Nor can respondent plausibly deny that the court in this instance failed to follow that usual rule, and instead adopted and applied a special signature/unmistakable assent rule to bar enforcement of petitioners' arbitration policy. Because the decision below unquestionably treats an employer's arbitration policy as materially different from other employment policies (and other types of contracts) under state law, it directly conflicts with the FAA's "same footing" mandate and numerous decisions of this Court enforcing that mandate.

CONCLUSION

For the foregoing reasons, and for the reasons previously stated, the petition should be granted.

Respectfully submitted,

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No. 02-1680

IN THE

Supreme Court of the United States

CIGNA CORPORATION, *et al.*,
Petitioners,

v.

PAUL LEODORI,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of New Jersey

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONERS

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On Petition for a Writ of Certiorari to the Supreme Court of New Jersey

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

To the Honorable, the Chief Justice and the Associate Justices of the United States Supreme Court:

Pursuant to Rule 37.1 and .2 of the Rules of this Court, the Equal Employment Advisory Council (EEAC) respectfully moves this Court for leave to file the accompanying brief as *amicus curiae* in support of the position of the Petitioners in this case. The written consent of Petitioners Cigna Corp., *et al.* has been filed with the Clerk of the Court. Respondent Paul Leodori *pro se* has refused consent.

In support of its motion, EEAC by the following shows that this brief brings relevant matters to the attention of the Court that have not already been brought to its attention by the parties:

1. The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in

1976 to promote sound approaches to the elimination of discriminatory employment practices. Its membership comprises a broad segment of the business community and includes over 340 of the nation's largest private sector corporations.

2. EEAC's directors and officers include many of industry's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC an unmatched depth of knowledge of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

3. All of EEAC's members are employers subject to Title VII of the Civil Rights Act of 1964 Act (Title VII), as amended, 42 U.S.C. §§ 2000e *et seq.*, the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. §§ 621 *et seq.*, Titles I and V of the Americans with Disabilities Act (ADA), as amended, 42 U.S.C. §§ 12101 *et seq.*, as well as other equal employment statutes and regulations.

4. Many of EEAC's members have contracts with their employees governing some or all terms and conditions of employment. Some of these contracts include agreements to arbitrate disputes arising out of the employment relationship.

5. As employers, and as potential respondents to employment discrimination claims, EEAC's members have a strong interest in the issue presented for the Court's consideration regarding whether, as the court below ruled, a state court may adopt a rule requiring an employee's "unmistakable" assent to an arbitration agreement before the agreement will be enforced, when

no such requirement is generally applicable to the enforceability of other contracts under state law, or whether such requirement is preempted by the Federal Arbitration Act.

6. EEAC's members, the vast majority of which conduct business in multiple states, have an ongoing interest in preserving the uniform enforceability of agreements calling for arbitration of employment-related disputes. Arbitration is a flexible, efficient, and effective alternative means of resolving discrimination claims and other employment-related issues. Agreements to arbitrate, like other privately negotiated contracts, afford parties to a dispute the right to establish clear standards and criteria against which their future conduct will be judged. It follows, then, that such agreements must be strictly enforced in the same manner and to the same extent as any other valid contract.

7. The issues presented in this appeal are extremely important to the nationwide constituency that EEAC represents. Contrary to the guiding principles established by this Court, the court below improperly failed to enforce an agreement to arbitrate employment disputes in the same manner as it would any other contract. In so doing, it deepened the conflict among the courts regarding the right of individual states to craft laws and rules applicable only to agreements to arbitrate, which ultimately work to undermine the federal public policy favoring private arbitration of disputes.

8. Thus, EEAC has an interest in, and a familiarity with, the issues and policy concerns presented to the Court in this case. Because of its significant experience in these matters, EEAC is well situated to brief the Court on the implications of the issues beyond the immediate concerns of the parties to the case.

WHEREFORE, for the reasons stated, the Equal Employment Advisory Council respectfully requests that the Court grant it leave to file the accompanying brief *amicus curiae*.

Respectfully submitted,

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IN THE

Supreme Court of the United States

No. 02-1680

CIGNA CORPORATION, *et al.*,
Petitioners,

v.

PAUL LEODORI,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of New Jersey

BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONERS

The Equal Employment Advisory Council respectfully submits this brief *amicus curiae* contingent upon the granting of the accompanying motion for leave. The brief supports the petition for a writ of *certiorari*.[1]

[1] Counsel for *amicus curiae* authored this brief in its entirety. No person or entity, other than the *amicus curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of the brief.

INTEREST OF THE *AMICUS CURIAE*

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of discriminatory employment practices. Its membership comprises a broad segment of the business community and includes over 340 of the nation's largest private sector corporations. EEAC's directors and officers include many of industry's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC an unmatched depth of knowledge of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

All of EEAC's members are employers subject to Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. §§ 2000e *et seq.*, the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. §§ 621 *et seq.*, Titles I and V of the Americans with Disabilities Act (ADA), as amended, 42 U.S.C. §§ 12101 *et seq.*, and other employment-related statutes and regulations. Many of EEAC's members have contracts with their employees governing some or all terms and conditions of employment. Some of these contracts include agreements to arbitrate disputes arising out of the employment relationship.

EEAC's members, the vast majority of which conduct business in multiple states, have an ongoing interest in preserving the uniform enforceability of agreements calling for arbitration of employment-related disputes. Arbitration is a flexible, efficient, and effective alternative means of resolving discrimination claims and other employment-related issues. Agreements to arbitrate, like other privately negotiated contracts, afford parties to a dispute the right to establish clear standards and criteria against which their

future conduct will be judged. It follows, then, that such agreements must be strictly enforced in the same manner and to the same extent as any other valid contract.

Thus, the issues presented in this appeal are extremely important to the nationwide constituency that EEAC represents. Contrary to the guiding principles established by this Court, the court below improperly failed to enforce an agreement to arbitrate employment disputes in the same manner as it would any other contract. In so doing, it deepened the conflict among the courts regarding the right of individual states to craft laws and rules applicable only to agreements to arbitrate, which ultimately work to undermine the federal public policy favoring private arbitration of disputes.

Because of its interest in this subject, EEAC has filed *amicus curiae* briefs in numerous cases before this Court and others supporting the enforceability of private agreements to arbitrate.[2] EEAC thus is familiar with the legal and public policy issues presented to the Court in this case. Because of its significant experience in these matters, EEAC is uniquely situated to brief this Court on the importance of the issues beyond the immediate concerns of the parties to the case.

STATEMENT OF THE CASE

This case involves the New Jersey Supreme Court's refusal to enforce a valid agreement to arbitrate to which an employee and his employer agreed to be bound for the resolution of all employment-related disputes. Respondent Paul Leodori was hired by Insurance Company of North

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[2] E.g., *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991); *Green Tree Fin Corp. v. Randolph*, 531 U.S. 79 (2000); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001); *EEOC v. Waffle House*, 534 U.S. 279 (2002); *Green Tree Fin. Corp. v. Bazzle, cert. granted*, 123 S. Ct. 817 (2003).

America (INA), a company related to Petitioner Cigna Corporation, in June 1995. Pet. App. 3a. He was employed as an attorney within INA's Division of Legal & Public Affairs (L&PA). *Id.*

Nearly a year before Respondent was hired, L&PA implemented a mandatory arbitration policy requiring the use of arbitration to resolve all employment-related disputes. *Id.* In August 1996, INA sent a revised mandatory arbitration policy to all L&PA employees, including Respondent. *Id.* Thereafter, in June 1998, the company distributed an L&PA employee handbook, which included a provision requiring arbitration as a term and condition of continued employment. Pet. App. 4a. The handbook was accompanied by an acknowledgement form, which was signed by Respondent in June 1998. Pet. App. 5a.

The following month, the company distributed another handbook, which also contained a mandatory arbitration provision. *Id.* Upon receipt of the handbook, employees were required to sign an acknowledgement form, as well as an "Employee Handbook Receipt and Agreement," which "described the arbitration agreement as a term of employment." Pet. App. 6a. Respondent did not sign the latter form. Pet. App. 7a.

Respondent's employment was terminated in May 1999, and in February 2000, he filed an action in New Jersey state court challenging his discharge. Pet. App. 9a. The trial court dismissed the action, "finding that the parties had entered into a binding agreement to arbitrate their dispute." *Id.* Respondent appealed, and the New Jersey Appellate Division reversed. Pet. App. 9a-10a. The New Jersey Supreme Court granted Petitioner's petition for certification. Pet. App. 10a.

In affirming the Appellate Division's ruling, the New Jersey Supreme Court determined that the arbitration agreement contained in the employee handbook could not be

enforced against Respondent because he failed to sign the "Employee Handbook Receipt and Agreement" form indicating his intent to be bound by the arbitration provision. Pet. App. 16a. Petitioners now have petitioned this Court for a writ of *certiorari*.

SUMMARY OF REASONS FOR GRANTING THE WRIT

This case presents the Court with the opportunity to resolve a growing conflict in the courts regarding whether a state may hold private agreements to arbitrate to a higher standard of enforceability than is generally applicable to other private contracts without running afoul of the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1 *et seq.* The answer, pursuant to this Court's pronouncements in *Southland Corp. v. Keating*, 465 U.S. 1 (1984) and *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681 (1996), simply is no. A state law, whether statutorily or judicially created, that imposes greater burdens on the enforceability of mandatory agreements to arbitrate than apply to other types of contracts is incompatible with, and therefore is preempted by, the FAA.

Despite the fact that implied contracts—which are unsigned—generally are enforceable under New Jersey state law, the court below refused to enforce an arbitration agreement contained in an employee handbook because it lacked the employee's actual signature indicating his "unmistakable" intent to be bound. While tacitly acknowledging the FAA's aim "to place arbitration agreements upon the same footing as other contracts," Pet. App. 12a, the court below nonetheless concluded, "In our view, a valid waiver results only from an explicit, affirmative agreement that unmistakably reflects the employee's assent." Pet. App. 14a. In a vain attempt to justify its ruling, the court remarked, "We do no more than conclude that an arbitration provision cannot be enforced against an employee who does not sign or other-

wise explicitly indicate his or her agreement to it. Consistent with basic contract law, that unremarkable conclusion in no way offends the FAA." Pet. App. 17a.

The court below misconstrued the actual nature of its ruling. The rule it adopted is not one of general applicability, but is directed specifically at agreements to arbitrate that require employees to waive their right to pursue claims in a judicial forum. Thus, it is quite remarkable and stands in direct conflict with this Court's declaration time and again that agreements to arbitrate are to be enforced to the same extent and degree as are other valid contracts. In holding the arbitration agreement to a higher standard than applies to other types of contracts, the court below joins several others that continue to disregard the clear limitations this Court has placed on the ability of state courts to regulate private agreements to arbitrate.

The lack of consistency in the courts regarding whether, and under what circumstances, private arbitration agreements may be held to higher enforceability standards than those applied to other private contracts creates substantial uncertainty in an area of law that is of great importance to the business community. As a direct consequence of the circuit court divide on this issue, many employers are constrained in their ability to enforce agreements to arbitrate in a uniform and consistent manner.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW DIRECTLY CONFLICTS WITH THIS COURT'S RULINGS IN *SOUTHLAND* AND *DOCTOR'S ASSOCIATES* ON AN ISSUE OF SUBSTANTIAL IMPORTANCE TO THE EMPLOYMENT COMMUNITY

In refusing to enforce an agreement to arbitrate contained in an employee handbook, the court below applied a different, more stringent rule than is "generally applicable" to other

contracts under New Jersey state law. Its decision thus impermissibly conflicts with this Court's seminal decisions in *Southland Corp. v. Keating*, 465 U.S. 1 (1984) and *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681 (1996) and should be reversed.

In *Southland Corp. v. Keating*, 465 U.S. 1 (1984), this Court ruled that a state law requiring resolution by judicial forum of all applicable claims—and thus precluding the enforcement of valid mandatory arbitration agreements—impermissibly conflicts with, and is preempted by, the Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq*. In so doing, the Court relied on the plain language of Section 2 of the FAA, which provides that agreements to arbitrate "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. It observed:

> We discern only two limitations on the enforceability of arbitration provisions governed by the Federal Arbitration Act: they must be a part of a written . . . contract "evidencing a transaction involving commerce" and such clauses may be revoked upon "grounds as exist at law or in equity for the revocation of any contract."

465 U.S. at 10-11 (footnote omitted). The Court thus concluded, "In enacting [Section] 2 of the federal Act, Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration." *Id*. at 10.

The Court reiterated this principle in *Perry v. Thomas,* 482 U.S. 483, 492 n. 9 (1987)(citations omitted):

> [S]tate law, whether of legislative or judicial origin, is applicable *if* that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally. A state-law principle that takes its meaning precisely from the fact that a contract to arbitrate is at

> issue does not comport with this requirement of § 2. A court may not, then, in assessing the rights of litigants to enforce an arbitration agreement, construe that agreement in a manner different from that in which it otherwise construes nonarbitration agreements under state law.

In *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681 (1996), this Court ruled that only "generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening § 2." 517 U.S. at 687. There, the Court considered the validity of a Montana state law that imposed a special notice requirement for all contracts subject to arbitration. Because this special notice requirement applied only to agreements to arbitrate, and not "'any contract,'" the Court concluded that the requirement "is thus inconsonant with, and is therefore preempted by, the federal law." *Id.* at 688.

In complete disregard of this Court's prior rulings [3], the court below refused to enforce an agreement to arbitrate contained in an employee handbook, holding that such an agreement "results only from an explicit, affirmative agreement that unmistakably reflects the employee's assent." Pet. App. 14a. While paying lip service to the "settled law that parties to an agreement may waive statutory remedies in favor of arbitration," Pet. App. 10a, the court below determined nonetheless, "[t]o enforce a waiver-of-rights provision *in this setting*, the Court requires some concrete manifestation of the employee's intent as reflected in the text of the agreement itself." *Id.* (emphasis added) (internal quotations and citation omitted).

Acknowledging that a party's signature is not "strictly required" in order to enforce other types of agreements under

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[3] Indeed, the decision below does not make a single reference to the Court's prior rulings on this issue.

New Jersey's implied contract doctrine, Pet. App. 18a, the court below determined that the doctrine "does not extend to a waiver-of-rights agreement." *Id.* It thus concluded that the arbitration agreement in this case—which requires employees to forgo a judicial forum in favor of an arbitral forum—"cannot be enforced against an employee who does not sign or otherwise explicitly indicate his or her agreement to it." Pet. App. 17a.

In holding the arbitration agreement in the instant case to a higher standard than applies to other types of contracts, the court below blatantly disregarded this Court's prior rulings prohibiting states from regulating such agreements beyond the bounds of the FAA. Accordingly, the petition for a writ of *certiorari* should be granted in this case.

II. THERE IS CONSIDERABLE DISAGREEMENT IN THE COURTS AS TO THE EFFECT OF A STATE RULE THAT LIMITS ENFORCEABILITY OF AN AGREEMENT TO ARBITRATE IN A MANNER THAT IS NOT REQUIRED OF OTHER CONTRACTS

The decision below deepens the existing conflict among state and federal courts regarding whether states may hold private arbitration agreements to a higher standard of enforceability than is applied to other valid contracts without conflicting impermissibly with the FAA. Relying on this Court's holdings in *Southland* and *Doctor's Associates*, a number of courts have refused to enforce state laws that impose burdens on arbitration agreements that are not generally applicable to other contracts. *See OPE Int'l LP v. Chet Morrison Contractors, Inc.*, 258 F.3d 443 (5th Cir. 2001) (FAA preempts Louisiana state arbitration law conditioning enforceability of construction arbitration agreement on selection of Louisiana forum); *Brayman Constr. Corp. v. Home Ins. Co.*, 319 F.3d 622 (3d Cir. 2003)

(Pennsylvania statute limiting enforceability of arbitration agreements preempted by FAA); *Doctor's Assocs., Inc. v. Hamilton*, 150 F.3d 157, 162 (2d Cir. 1998) (FAA preempts New Jersey state law that "impermissibly burden[s]" arbitration agreements); *Heaberlin Farms, Inc. v. IGF Ins. Co.*, 641 N.W.2d 816 (Iowa 2002) (Iowa state arbitration law that excludes adhesion contracts from coverage is preempted by the FAA). As one court pointed out:

> Because the fundamental purpose of the Federal Arbitration Act "was to place an arbitration agreement 'upon the same footing as other contracts, where it belongs'," *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219, 105 S. Ct. 1238, 1241, 84 L. Ed. 2d 158 (1985) (quoting H.R. Rep. No. 96, 68th Cong., 1st Sess. 1 (1924)), the courts have been vigilant to ensure that state law concepts specially directed at arbitration contracts are not permitted to "eviscerate" that purpose, even indirectly.

Security Indus. Ass'n. v. Connolly, 703 F. Supp. 146, 151 (D. Mass. 1988), *aff'd*, 883 F.2d 1114 (1st Cir. 1989). These courts consistently have recognized that "a state law or regulation cannot take root if it looms as an obstacle to the achievement of the full purposes and ends which Congress has itself set out to accomplish." *KKW Enters., Inc. v. Gloria Jean's Gourmet Coffees Franchising Corp.*, 184 F.3d 42, 49 (1st Cir. 1999) (citation omitted).

By contrast, some other courts, expressing a general disdain for mandatory arbitration, have permitted more onerous legal burdens to be imposed on arbitration agreements than exist for other types of contracts. *See Cruz v. Pacificare Health Sys., Inc.*, 66 P.3d 1157 (Cal. 2003) (claims for injunctive relief under state law are not arbitrable); *Broughton v. Cigna Healthplans*, 988 P.2d 67

(Cal. 1999) (same); *Allstar Homes, Inc. v. Waters*, 711 So. 2d 924 (Ala. 1997) (waiver of right to trial by jury unenforceable unless there exists "clear and unmistakable" evidence of agreement to waive such rights), *overruled on other grounds by Ex parte Perry*, 744 So. 2d 859 (Ala. 1999).

In *Cruz v. Pacificare*, for instance, the California Supreme Court refused to enforce a valid agreement to arbitrate with respect to the plaintiff's action for injunctive relief under the state's Consumer Legal Remedies Act (CLRA). Citing with approval its prior ruling in *Broughton v. Cigna Healthplans*, 988 P.2d 67 (Cal. 1999), the court first acknowledged this Court's pronouncements regarding the enforceability of arbitration agreements:

> In *Broughton*, we recognized that the United States Supreme Court has emphasized Congress's and its own policy in favor of arbitration and, at least since 1984, has rejected numerous efforts and arguments by state courts, federal courts and litigants to declare certain classes of cases not subject to arbitration. Indeed, we acknowledged the Supreme Court's broad statement in its seminal arbitration case, *Southland Corp. v. Keating* that "'[i]n enacting § 2 of the [FAA], Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration.'"

Cruz v. Pacificare Health Sys., Inc., 66 P.3d at 1161-62 (citations omitted). The court disregarded this clear language, however, and instead relied on its own incorrect, albeit creative, interpretation:

> [A]lthough the court [sic] has stated generally that the capacity to withdraw statutory rights from the scope of arbitration agreements is the prerogative solely of Congress, not state courts or legislatures, it has never directly decided whether a legislature may restrict a private arbitration agreement when it inherently

> conflicts with a public statutory purpose that transcends private interests.

66 P.3d at 1163 (citation omitted). The court thus concluded, "it would be perverse to extend the policy so far as to preclude states from passing legislation the purposes of which make it incompatible with arbitration, or to compel states to permit the vitiation through arbitration of the substantive rights afforded by such legislation." *Id.*

Similarly, the Ninth Circuit in *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165 (9th Cir. 2003), recently ruled that mandatory agreements to arbitrate are *presumptively* invalid under California law, rendering it virtually impossible to enforce such agreements in that state.[4] Grossly distorting the rule of unconscionability articulated by the California Supreme Court in *Armendariz v. Foundation Health Psychcare Services, Inc.*, 6 P.3d 669 (Cal. 2000), the Ninth Circuit in *Ingle* declared, "we find the coverage of such arbitration agreements typically and grossly one-sided, and therefore, presumptively substantively unconscionable." 328 F.3d at 1174 n.10. It also reiterated the conclusion it drew last year in *Circuit City Stores, Inc. v. Adams*, 279 F.3d 889 (9th Cir.), *cert. denied*, 535 U.S. 1112 (2002), that any arbitration agreement required as a condition of employment, in essence, is *presumptively* procedurally unconscionable. *Id.* at 1171-72.

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[4] Notably, the Ninth Circuit's decision in *Ingle* was issued just days before the California General Assembly once again approved anti-arbitration legislation that would prohibit pre-dispute mandatory arbitration agreements requiring, as a condition of employment, waiver of an employee's or applicant's right to pursue claims under the state Fair Employment and Housing Act. *See* A.B. 1715, 2003-2004 Leg., Reg. Sess. (Cal. 2003) (*An Act to amend Section 1281 of the Code of Civil Procedure, and to add Section 12952 to the Government Code, relating to employment arbitration).*

This dim and altogether inaccurate view of the law unfortunately is not limited to the California courts. In *Allstar Homes*, for instance, the Alabama Supreme Court observed in a footnote:

> Although we do not address the full implications of waiving one's right to a trial by jury in favor of arbitration of disputes, we do point out that the due process safeguards found in judicial proceedings are largely absent in arbitration. The reputed informality and the relative speediness of an arbitration procedure are achieved by severely limiting discovery; imposing few evidentiary rules; giving the arbitrator almost unbridled discretion to make decisions without basing them on established principles of law or making written findings to support the arbitrator's conclusions; and providing virtually no right of appeal in the case of error in the arbitrator's decision.

711 So. 2d at 928 n1.

This Court repeatedly has affirmed the strong federal policy favoring arbitration, noting that the purpose of the FAA "was to reverse the longstanding judicial hostility to arbitration agreements . . . and to place arbitration agreements on the same footing as other contracts." *Gilmer v. Interstate/ Johnson Lane Corp.*, 500 U.S. 20, 24 (1994)(citations omitted); *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 89 (2000); *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 289 (2002). Thus, "'questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration.'" *Gilmer*, 500 U.S. at 26 (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)).

Despite this strong federal policy favoring arbitration, far too many courts continue to ignore the limitations placed on their authority to regulate agreements to arbitrate and seek to invalidate such agreements at every turn. Thus, certiorari

should be granted so that this Court may put to rest any lingering doubt as to the validity of arbitration in general, as well as the rights of states to regulate arbitration agreements beyond the permissible scope of the FAA.

III. RULES THAT IMPOSE GREATER RESTRICTIONS ON AGREEMENTS TO ARBITRATE THAN EXIST FOR OTHER CONTRACTS SUBSTANTIALLY UNDERMINE EMPLOYERS' EFFORTS TO DEVELOP AND ENFORCE UNIFORM ADR PROCEDURES

The lack of consistency in the courts regarding whether, and under what circumstances, private agreements to arbitrate will be enforced creates substantial uncertainty in an area of law that is of great importance to the business community. EEAC member companies, many of which conduct business in numerous states, are strongly committed to equal employment opportunity and seek to establish and enforce internal policies that are consistent with federal employment non-discrimination laws. This commitment extends to the prompt and effective resolution of employment disputes using arbitration and other forms of alternative dispute resolution. A number of EEAC member companies thus have adopted company-wide policies requiring the use of arbitration to resolve all employment-related disputes.

As this Court observed in *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 122-123 (2001), there are "real benefits to the enforcement of arbitration provisions." In particular, "'[a]rbitration agreements allow parties to avoid the costs of litigation, a benefit that may be of particular importance in employment litigation . . . .'" *Id.* at 123. Thus, to exempt employment contracts from coverage under the FAA "would call into doubt the efficacy of alternative dispute resolution procedures adopted by many of the Nation's employers, in

the process undermining the FAA's proarbitration purposes and breeding litigation from a statute that seeks to avoid it." *Id.* (internal quotation and citation omitted).

There remain a number of notoriously anti-arbitration courts, notably in New Jersey and California, that continue to subject agreements to arbitrate to higher enforceability standards than are imposed upon other types of contracts. Multistate employers thus are faced with the real possibility that their programs will not be enforced uniformly for all of their employees. Indeed, employers are all but assured that their arbitration agreements, while valid in most other states, will be deemed unenforceable in New Jersey and California. As a consequence, employees subject to agreements to arbitrate who are located in New Jersey and California will not be required to submit their work-related disputes to arbitration, while their colleagues employed elsewhere will be so bound.

The prospect of having to litigate, from state to state, the enforceability of their arbitration agreements creates a chilling effect on employers' efforts to establish binding arbitration programs, and significantly undercuts the strong federal policy, as repeatedly endorsed by this Court, favoring private arbitration of employment disputes. For these reasons, this Court should review and reverse the decision below.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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